No. 08-919

In The

Supreme Court of the United States

JAMES L. ANDROS, III,

Petitioner,

-v.-

SGT. BRUCE K. DESHIELDS, JEFFREY S. BLITZ, ESQUIRE, MURRAY A. TALASNIK, ESQUIRE, STATE OF NEW JERSEY, AND CPT. CHRISTOPHER WELLMAN, individually, jointly, severally and in the alternative,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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LIST OF ALL PARTIES AND CORPORATE DISCLOSURE STATEMENT

Before this Court, as before the Third Circuit Court of Appeals, the parties are as reflected in the caption. In the United States District Court for the District of New Jersey below, in addition to Petitioner James L. Andros, III, individually and as guardian of his daughters M.E.A. and E.A., additional parties were as follows: Elliot M. Gross, M.D., Sgt. Bruce K. DeShields, Lt. Eladio Ortiz, Jeffrey S. Blitz, Murray A. Talasnik, Esquire, Hydow Park, M.D., Barbara Fenton, County of Atlantic, the State of New Jersey, and Cpt. Christopher Wellman.

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Petitioner James L. Andros respectfully prays that a Writ of *Certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in the above-entitled proceeding on September 22, 2008. That opinion affirmed the decision of the United States District Court for the District of New Jersey that Respondents were entitled to absolute and/or qualified immunity for their actions in prosecuting Mr. Andros for the murder of his wife. There is no dispute that Mr. Andros is innocent and did not murder his wife. There is a dispute, however, regarding whether the evidence available to Respondents at the time of the investigation and arrest supported a reasonable belief in probable cause.

The Third Circuit's ruling – that Respondents acted with a reasonable belief in probable cause because it was not "logically impossible" that Mr. Andros could have committed a crime – turns the probable cause and summary judgment standards on their heads and stands in contrast to firmly established precedent of this Court. Effectively, the Third Circuit's decision denies a civil remedy to a plaintiff attempting to recover against prosecutors and investigators unless the plaintiff can prove that it was "logically impossible" for him to have committed a crime.

OPINIONS BELOW

The Third Circuit held that the district court had not erred in granting summary judgment to Respondents on the grounds that Respondents were entitled to absolute and/or qualified immunity as to Petitioner's various state and federal law claims. *See* Third Circuit Opinion, App. 1-11. The Third Circuit subsequently denied Petitioner's Petition for Rehearing or Rehearing *En Banc*. *See* Order, App. 126.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on September 22, 2008. *See* App. 12. Petitioner herein filed a timely Petition for Rehearing and Rehearing *En Banc*, which the Court of Appeals denied on October 20, 2008. *See* App. 126. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or

> immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

United States Constitution, Amendment IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fed. R. Civ. P. 56 provides, in relevant part:

> (a) By a Claiming Party. A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim. The motion may be filed at any time after:
>
> (1) 20 days have passed from commencement of the action; or

(2) the opposing party serves a motion for summary judgment.

(b) By a Defending Party. A party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim.

(c) Serving the Motion; Proceedings. The motion must be served at least 10 days before the day set for the hearing. An opposing party may serve opposing affidavits before the hearing day. The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

STATEMENT OF THE CASE

A. Procedural Background

It is undisputed that Mr. Andros was investigated, arrested and prosecuted for a crime he did not commit – the murder of his wife, Ellen. Respondents Murray A. Talasnik, Bruce K. DeShields, Jeffrey S. Blitz and Christopher Wellman were the prosecutors and investigators who concluded, after a shoddy investigation and despite a solid alibi, that Mr. Andros was guilty. Mr. Andros did not murder Ellen. In fact, Ellen was not murdered at all, but died of natural causes.

Mr. Andros filed a Complaint on April 22, 2003, against Respondents Talasnik, DeShields, and Blitz seeking relief for himself and for his minor children M.E.A. and E.A. Respondents filed a Motion for Summary Judgment and/or Dismissal of the claims against them on July 25, 2003. When the District Court decided Respondents' Motion, Mr. Andros' claims against Respondents included, among others, section 1983 claims based on violations of Mr. Andros' civil rights[1], New Jersey state law claims[2], and common law claims.[3]

The District Court dismissed all federal claims against Respondents Blitz, Talasnik and DeShields in its February 23, 2004 Order and Opinion. *See* App. 21. The District Court granted summary judgment on those federal claims because of the District Court's determination that Respondents were entitled to immunity on those claims. *Id.* Mr. Andros moved for partial reconsideration of the District Court's Order on March 8, 2004, on the grounds that the District Court had misapplied the summary judgment standard and that the District Court erred in holding that probable cause existed as a matter of law.

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[1] These claims included Malicious Prosecution, Interference with Family Relations, Defamation, Conspiracy, Supervisory Liability against Respondent Blitz, and Abuse of Process.

[2] Petitioner's state law claims were for Malicious Prosecution, Interference with Family Relations and Abuse of Process.

[3] Petitioner's common law claims were for Conspiracy, Aiding and Abetting the Commission of a Tort, Negligence and Abuse of Process.

Respondents subsequently moved for dismissal and/or summary judgment on Mr. Andros' remaining state law claims. On December 3, 2004, Mr. Andros filed a Complaint against Wellman. The actions against all Respondents were consolidated on December 21, 2004. Wellman moved for summary judgment on April 8, 2005. *See* App. 93. In a December 21, 2005 opinion, the District Court granted Respondents' remaining Motions for Summary Judgment and/or Motions to Dismiss, and denied Mr. Andros' Motion for Reconsideration. *Id.* at 93-94. The District Court noted in its Opinion that it was treating the motions as if they were summary judgment motions for purposes of making its decision. *Id.* at 93.

B. The Substantive Record

This case is rife with disputed issues of fact, but the most important facts are very simple: Ellen Andros was in her home and alive at 1:48 a.m., she was dead before 3:00 a.m., and Respondents were presented with uncontradicted evidence that Mr. Andros was away from home until 3:50 a.m. at the earliest. Simply put, there is uncontradicted evidence that Respondents were not only aware of these facts, but that they actively concealed the contradiction between Ellen's time of death and Mr. Andros' alibi.

On the early morning of Saturday, March 31, 2001, Mr. Andros returned home from a night out with his father to find his wife of six years, Ellen, unresponsive in the room where the couple's two

daughters, M.E.A. and E.A., were sleeping. Mr. Andros attempted to revive Ellen and called the paramedics, but she was pronounced dead at the scene. Ellen had died when an artery in her heart spontaneously dissected and caused a blockage (an occlusion) in the artery.

When first responders arrived, the Andros' daughters were still asleep in the room where Ellen died – they slept through their mothers' passing. Neither Ellen's body nor Mr. Andros' body showed any signs of a struggle: there was no bruising or cuts, and Ellen's fingernails were intact.

From the beginning of Respondents' investigation into Ellen's death, Mr. Andros told Respondents that he had been away from home on the morning of his wife's death. He was at the Beach Bar & Grill ("the Bar"), continually from about 8:45 p.m. until around 4:00 a.m. In addition, Respondents were told by no less than seven people that Mr. Andros was at the Bar from well before Ellen sent her last email, at 1:48 a.m. until 3:30 a.m., at the earliest, on March 31. Although the witnesses' testimony varied a bit with respect to Mr. Andros' arrival time at the Bar, all witnesses agreed that he stayed at the Bar until it closed at 3:30 or 4:00 a.m. The Andros' home was approximately twenty minutes from the Bar by car. Respondents conceded in their depositions that they had no evidence contradicting Mr. Andros' well-corroborated alibi.

Dr. Elliot M. Gross, the Assistant Medical Examiner who did Ellen's autopsy, informed Respondents of his opinion that Ellen died between 1:48 a.m. and around 2:20 a.m.[4] Regardless, Respondents continued to question Dr. Gross in an attempt to make time of death evidence consistent with their suspicion that Mr. Andros had murdered Ellen. They asked Dr. Gross whether it was possible that the death could have occurred between 4:00 and 4:30 a.m. in light of Mr. Andros' alibi. Dr. Gross recalls informing Respondents that it was "highly unlikely" that Ellen died closer to 4 a.m.

Regardless of the fact that Dr. Gross gave Respondents a specific window for Ellen's time of death, Dr. Gross omitted that information from his report. When Dr. Gross asked Respondents whether he should defer certification of the cause and manner of death until more investigation had been done regarding time of death, Respondent Blitz told Dr. Gross that it was "not necessary to do so." Inexplicably, when Dr. Gross issued his report, he classified Ellen's death as a homicide.

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[4] Dr. Gross based his time of death in part on investigators' determination that Ellen sent her last email at 1:48 a.m., and that her internet account was automatically logged off due to inactivity at around 2:20 a.m. Respondents alleged before the District Court that Ellen's account had been logged off actively, rather than due to inactivity. Thus, a factual dispute existed regarding how and why Ellen's account was logged off.

All of these facts lead to an inexorable inference that Respondents were aware of Dr. Gross' findings regarding time of death, were frustrated with the results, and chose to conceal and ignore time of death evidence. Ellen's time of death, when compared with Mr. Andros' alibi, led to the conclusion that Mr. Andros was not home when Ellen died. Regardless, over three weeks after Ellen's death, Mr. Andros was arrested for his wife's murder.

The warrant for Mr. Andros' arrest was issued based solely on Respondent DeShields' testimony, in which he stated only two facts: the Medical Examiner had ruled Ellen's death a homicide, and Mr. Andros was the "only adult who had access to the victim" near her time of death. Later, before the grand jury, Respondents answered a question from the grand jury regarding time of death by stating, falsely, that they had no evidence regarding time of death.

As a result of Respondents' actions in railroading, arresting and prosecuting Mr. Andros, he was stripped of custody of his two daughters. An innocent man, Mr. Andros simultaneously mourned the loss of his wife and awaited prosecution for her murder, while M.E.A. and E.A. were forced to spend nearly two years of their formative years out of the custody of their only surviving parent.

Nearly two years after Respondents ignored and manipulated evidence to secure an indictment against Mr. Andros, an independent medical examiner reviewed slides of Ellen's heart tissue, noted an obvious

blockage in one of Ellen's coronary arteries, and concluded that Ellen died of natural causes. Finally, Mr. Andros was vindicated and Respondents were forced to drop the charges against him.

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

This Court should exercise its discretion and grant the requested Writ of *Certiorari* because the Third Circuit has decided important federal questions in a way that conflicts with relevant decisions of this Court. U.S. Sup. Ct. R. 10(c). Namely, the Court applied an improper probable cause standard and misapplied the summary judgment standard, thus expanding official immunities to a seemingly limitless degree.

A. The Third Circuit Created a New Standard of "Possible Cause" That Is Inconsistent with This Court's Jurisprudence

The Third Circuit concluded that probable cause existed for Mr. Andros' arrest – and consequently that Respondents were entitled to official immunity – because at the time when Respondents were investigating Mr. Andros, it was "***not impossible***" that he could have killed his wife. The Court's use of a "not impossible" test creates a new standard for immunity and shields all but the most egregiously unreasonable conduct by public officials. The Third Circuit's new

standard is in direct contrast to the well-established probable cause standard this Court has articulated and, for that reason, *certiorari* should be granted.

Probable cause exists if "at the moment the arrest was made . . . the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing" that a crime has been committed by the person to be arrested. *Beck v. Ohio*, 379 U.S. 89, 91 (1964). Probable cause must be based on more than mere suspicion. *Henry v. United States*, 361 U.S. 98, 104 (1959). The probable cause standard, therefore, does not center on whether it is *possible* that a suspect is guilty, but whether the credible evidence would warrant a prudent man to believe that the suspect is guilty.

In its Opinion, the Third Circuit made inconsistent and legally incorrect statements of the law. Although the Court initially quoted the probable cause standard properly, the Court went on to apply a standard of "possible cause" – that is, whether it was possible, looking at the evidence through the eyes of Respondents, that Respondents could have believed Mr. Andros was guilty. In holding that probable cause existed, the Court stated that "Mr. Andros' alibi was not flawless," and that Dr. Gross' time of death opinion did not render it "logically impossible" that Mr. Andros had killed Ellen. App. at 7-8. Further, the Court reasoned that it was "reasonable for [Respondents] to rely on the ***possibility*** that the medical examiner's time of death estimate was not perfect."

App. at 8 (emphasis added). Most importantly, the Court stated that it was reasonable for Respondents to have concluded that Mr. Andros killed Ellen at 4:00 a.m., and that "though witness accounts and medical evidence made this scenario unlikely, it was ***not impossible***." *Id.* (emphasis added).

As is clear from the Third Circuit's opinion, the Court focused on whether Respondents' version of events was *possible*. Had the Court properly applied the probable cause standard, and considered whether the evidence was sufficient to warrant a prudent man in believing that Mr. Andros was guilty, the Court would have been compelled to conclude that probable cause did not exist under these facts. Respondents were well aware that Mr. Andros had an alibi that meant that he was home at 3:50 at the earliest, and that it was "highly unlikely" that Ellen died that late. The inference that should have been drawn in favor of Mr. Andros is that Respondents were aware that Dr. Gross' findings defeated probable cause, because they contacted Dr. Gross to ask him to revisit his time of death opinion on more than one occasion and discouraged him from delaying the issuance of his report to do more thorough research. Simply put, the Court should not have found probable cause under these facts, and the use of a "possible cause" standard is incorrect as a matter of law.

The import of a consistent application of the probable cause standard by United States courts cannot be overstated. Not only does probable cause have a central role in Fourth Amendment

jurisprudence, but it provides the starting point for any analysis of qualified or absolute immunity of law enforcement officials. In addition, probable cause is a central question in any malicious prosecution or abuse of process civil lawsuit between private parties.

Probable cause has a pivotal role in a determination of whether prosecutors are entitled to absolute immunity. Absolute immunity protects prosecutors from suit only when they are acting in the role of an advocate. *Buckley v. Fitzsimmons*, 509 U.S. 259, 274 (1993). This Court has held that a prosecutor "neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Id.*

Additionally, an official's entitlement to qualified immunity depends on the existence of probable cause. Government officials are entitled to qualified immunity "insofar as their conduct does not violate clearly established constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). For purposes of determining whether an official is entitled to qualified immunity, the court's first step is to find whether the official has violated the plaintiff's Constitutional rights. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If so, then the court determines whether the right that was violated was "clearly established." *Id.* An arrest without probable cause violates a person's clearly-established Constitutional right to be free from unreasonable search and seizures. U.S. Const. Amend. IV; U.S. Const. Amend.

XIV; *see also Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

If the Third Circuit's misstatement of the probable cause standard were followed, then a plaintiff attempting to recover for a violation of his civil rights as a result of a wrongful arrest and prosecution would essentially need to prove that officials acted despite knowing that it was impossible for him to have committed the crime. This represents a new, much higher standard for plaintiffs to surmount, and effectively prevents them from obtaining relief.

Because the probable cause standard is central to a number of important areas of the law, including officials' entitlement to immunity, this Court should grant *certiorari* to correct the Third Circuit's adoption of a novel and incorrect probable cause standard.

B. The Third Circuit Misapplied the Federal Summary Judgment Standard

The Third Circuit, like the District Court below, resolved factual disputes on summary judgment in favor of Respondents, the non-moving party. In so doing, the Third Circuit acted contrary to the clear mandates of Federal Rule of Civil Procedure 56(c) and this Court's jurisprudence.

Federal Rule of Civil Procedure 56(c) states that summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue

as to any material fact and that the movant is entitled to judgment as a matter of law." *See, e.g.*, *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 329 (1999) (citing *Lujan v. National Wildlife Federation*, 497 U.S. 871, 884 (1990)). The inquiry performed on summary judgment is the threshold inquiry of determining whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). A district court generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented. *Agosto v. INS*, 436 U.S. 748, 756 (1978).

Generally, the question of probable cause is one for the fact-finder. *Merkle v. Upper Dublin Sch. Dist.*, 211 F.3d 782, 788 (3d Cir. 2000). This is particularly true where the probable cause determination requires evaluations of credibility. *Id.* Summary judgment is inappropriate when the evidence, viewed most favorably to the non-moving party, could support a finding that no probable cause existed. *Id.* at 788-89.

Here, the Third Circuit failed to view the evidence in the light most favorable to Mr. Andros, and resolved factual disputes in favor of the *moving party*, Respondents. Although the Third Circuit purported to "construe all disputed facts in favor of Andros, the non-moving party," it instead explained away all of Mr. Andros' evidence and concluded that Respondents'

reading of the evidence was "not impossible." App. at 3, 8.

Before the Trial Court, in opposition to Respondents' Motion for Summary Judgment, Mr. Andros presented the following evidence, all of which created genuine issues of material fact as to the existence of probable cause:

- Respondents were told by the medical examiner that Ellen Andros likely died between the hours of 1:48 and 2:20 a.m.;
- Respondents were specifically told that it was "highly unlikely" that Ellen died closer to 4:00 a.m.;
- A number of witnesses, at a bar with Mr. Andros' father and others, testified that Mr. Andros was at the bar, approximately twenty minutes from home, until at least 3:30 a.m. The testimony of these witnesses was uncontradicted, and Respondents offered no contrary evidence suggesting that Mr. Andros left the bar before that time;
- Respondents knew that time of death was centrally important to their investigation of whether Mr. Andros was responsible for Ellen's death;
- Respondents contacted the medical examiner who was responsible for the Ellen Andros death investigation and attempted to "brainstorm" time of death information, in addition to suggesting a

time of death window to the medical examiner, supporting the inference that Respondents manipulated the medical examiner's findings and caused him to omit any reference to time of death in his reports;

- Despite the above described time of death evidence, Respondents DeShields and Talasnik told the grand jury that Ellen died at 4:30 a.m.;

- Even more disturbingly, Dr. Gross told Respondents a window for time of death and Respondents subsequently lied to the grand jury, telling the grand jury that the Medical Examiner did not give a time of death;

- Plaintiff's expert, a former homicide prosecutor, opined that, even assuming that the medical examiner was correct in finding that Ellen's death was a homicide, no prosecutor or investigator, faced with the evidence in Respondents' possession in the days and weeks following Ellen's death, could have reasonably believed that Mr. Andros murdered his wife; and

- Physical evidence found at the scene of Ellen's death was flatly inconsistent with the proposition that she had been murdered.

Each of these allegations, supported by credible evidence, created a genuine issue of material fact that precludes summary judgment. If these facts are to be believed, a reasonable official could not believe that probable cause existed for Mr. Andros' arrest.

Mr. Andros' evidence clearly created a genuine issue of material fact, such that in order to grant summary judgment in Respondents' favor, it was first necessary for the District Court – and the Third Circuit – to explain away Mr. Andros' evidence. The Third Circuit discounted Mr. Andros' alibi, calling it "not flawless." App. at 7. Further, the Court accepted as true Respondents' contention that Ellen had actively logged off of her AOL account at 2:20 a.m., even though Petitioner presented credible evidence that Ellen's account was logged off due to inactivity. *Id.* Finally, the Third Circuit noted that there were "conflicting observations" about the physical evidence at the scene of Ellen's death, and specifically the presence or absence of rigor. App. at 8. Despite these factual disputes, all of which would have required resolution by the finder of fact and all of which were material to the reasonableness of Respondents' conduct, the Third Circuit affirmed the District Court's decision to grant summary judgment.

The Third Circuit's decision turns the summary judgment standard on its head. It is essential that courts apply the summary judgment standard in the proper manner, so that parties are not stripped of their Seventh Amendment right to have their case decided by a jury. Accordingly, the Third Circuit's

decision should be reversed and this Court should grant *certiorari*.

CONCLUSION

The Third Circuit misapplied both the probable cause standard and the standard for entitlement to summary judgment. At its core, this case represents a vast expansion of the immunities to which government officials are conditionally entitled. Accordingly, this Court should grant *certiorari* to correct the Third Circuit's manifest errors of law.

Respectfully submitted,

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NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-2259

JAMES L. ANDROS, III, individually and as
Father and Natural Guardian
on behalf of xxx and xxx, minors,

Appellant

v.

M.D. ELLIOT M. GROSS; BRUCE K. DESHIELDS,
SGT.; ELADIO ORTIZ, LT.; JEFFREY S. BLITZ,
ESQUIRE; MURRAY TALASNIK, ESQUIRE;
M.D. HYDOW PARK; BARBARA FENTON;
COUNTY OF ATLANTIC; STATE OF NEW JERSEY;
JOHN DOE, INVESTIGATORS 1-50, individually,
jointly, severally and in the alternative;
CHRISTOPHER WELLMAN, CPT.

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 03-cv-01775)
District Judge: Honorable Jerome B. Simandle

Submitted Under Third Circuit L.A.R. 34.1(a),
September 11, 2008

Before: SLOVITER, FUENTES, and
ALDISERT, *Circuit Judges*.

(Opinion Filed: September 22, 2008)

OPINION OF THE COURT

FUENTES, *Circuit Judge*:

In April 2001, Appellant James Andros ("Andros"), a former Atlantic County police officer, was arrested by officers from the Atlantic County Prosecutor's Office for murdering his wife, Ellen Andros. He was indicted on that charge by grand jury in June 2001, and lost both his job and custody of his two daughters. In late 2002, a follow-up medical exam revealed that Ellen Andros had not died from asphyxiation, as the county's medical examiner had originally concluded, but rather from a spontaneously dissecting coronary artery, an extremely rare form of heart attack. The charge against Andros was immediately dismissed.

In April 2003, Andros filed suit against employees of the Atlantic County Medical Examiner's Office, along with county prosecutors and police officers and the State of New Jersey, asserting a number of federal and state law claims related to his allegedly illegitimate arrest. Andros now challenges the District Court's award of summary judgment in favor of certain prosecutor and police officer defendants – attorneys Jeffrey Blitz and Murray Talasnik, Sergeant Bruce DeShields, and Lieutenant Eladio Ortiz – and the dismissal of his claims for unconstitutional interference with familial relations. For the reasons that follow, we will affirm the District Court's rulings.

I.

The District Court held that the prosecutors, Talasnik and Blitz, were acting in a prosecutorial role in deciding to charge Andros with murder and thus had absolute immunity to any charges related to their conduct at that point. Secondly, the Court found that the appellees had probable cause to arrest Andros and thus were entitled to qualified immunity from most of the federal claims. Finally, the Court dismissed without prejudice the counts relating to alleged unconstitutional interference with family relations for failure to plead those claims with sufficient specificity. On a motion for partial reconsideration of the summary judgment order, the District Court extended its qualified immunity ruling to dismiss a number of the state law claims against appellees.

We have plenary review over the District Court's award of summary judgment. *Johnson v. Knorr,* 477 F.3d 75, 81 (3d Cir. 2007). We construe all disputed facts in favor of Andros, the non-moving party, and will affirm the district court's grant of summary judgment only if there is "'no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law.'" *Kopec v. Tate,* 361 F.3d 772, 775 (3d Cir. 2004) (quoting Fed. R. Civ. P. 56(c)). We also have plenary review of the dismissal of the familial interference claims. *Wilkerson v. New Media Tech. Charter Sch. Inc.,* 522 F.3d 315, 318 (3d Cir. 2008).

II.

Because we write exclusively for the parties, we discuss only the facts necessary for our analysis below. The primary basis for Andros's claims was his charge that the defendants investigated and indicted him for his wife's murder despite their knowledge that he was at a local bar, the Beach Bar and Grill ("the Beach Bar"), twenty minutes from his home, at the time of Ellen's death.

A.

Prosecutors Talasnik and Blitz are entitled to absolute immunity from Andros's claims to the extent they rest on the prosecutors' decision to charge Andros with murder. A prosecutor has absolute immunity for conduct "'intimately associated with the judicial phase of the criminal process,'" as part of his or her role as an advocate, but not for investigative acts. *Buckley v. Fitzsimmons,* 509 U.S. 259, 270 (1993) (quoting *Imbler v. Pachtman,* 424 U.S. 409, 430 (1976)). The Supreme Court has expressly held that a prosecutor's decision to initiate a prosecution is the action of an advocate participating in the judicial process. *Imbler,* 424 U.S. at 431. Therefore, in that role a prosecutor has absolute immunity from suit under § 1983. *Id.* (extending absolute immunity to prosecutor who prosecuted individual despite presence of allegedly exonerating evidence); *see also Kulwicki v. Dawson,* 969 F.2d 1454, 1464 (3d Cir. 1992) (citing *Imbler*). Although the Supreme Court

has stated that "[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested," we hold below that probable cause existed to arrest Andros, making that consideration irrelevant to our analysis. *Buckley*, 509 U.S. at 274.

Similarly, any misconduct by Talasnik or DeShields in their presentation to the grand jury falls within the protection of absolute immunity. As to Talasnik, the Third Circuit has stated that "soliciting false testimony from witnesses in grand jury proceedings and probable cause hearings is absolutely protected." *Kulwicki v. Dawson*, 969 F.2d 1454, 1465 (3d Cir. 1992). With respect to DeShields, he is subject to absolute immunity from civil suit as a witness. *See id.* at 1467 n.16 (clarifying that witness immunity extends to investigators testifying in a grand jury proceeding); *see also Williams v. Hepting*, 844 F.2d 138, 141 (3d Cir. 1988).

B.

We will also affirm the District Court's ruling that the defendants had probable cause to arrest Andros. Probable cause exists when "the facts and circumstances within the arresting officer's knowledge are sufficient in themselves to warrant a reasonable person to believe that an offense has been or is being committed by the person to be arrested." *Orsatti v. N.J. State Police*, 71 F.3d 480, 483 (3d Cir. 1995) (citations omitted). This standard requires

"more than mere suspicion," but not "evidence sufficient to prove guilt beyond a reasonable doubt." *Id.* at 482-83. In gauging probable cause, "'[a]n officer contemplating an arrest is not free to disregard plainly exculpatory evidence, even if substantial inculpatory evidence (standing by itself) suggests that probable cause exists.'" *Wilson v. Russo,* 212 F.3d 781, 790 (3d Cir. 2000) (quoting *Kuehl v. Burtis,* 173 F.3d 646, 650 (8th Cir. 1999)).

In this case, the defendants reasonably thought Andros had murdered his wife. Contrary to Andros's allegations, they need not have ignored the available alibi and time of death evidence in order to believe him guilty. Rather, they simply gave that evidence a different construction, one that was reasonable at the time. *Compare Kuehl v. Burtis,* 173 F.3d 646, 651 (8th Cir. 1999) (concluding no probable cause existed where police officer refused to even listen to witness's and suspect's alternative account of events); *Baptiste v. J.C. Penney Co.,* 147 F.3d 1252, 1256 (10th Cir. 1998) (finding no probable cause where officer ignored videotape clearly depicting conduct in question in favor of second-hand account of security guards as to their observations of alleged shoplifter). Nor is this a case where further reasonable investigation would have revealed Andros's innocence; the defendants fully explored Andros's potential alibi and available information regarding Ellen's time of death. *Compare BeVier v. Hucal,* 806 F.2d 123, 128 (7th Cir. 1986) (holding that police had unreasonably disregarded possible clarifying evidence by refusing to question

easily available witnesses to suspected child neglect); *Bigford v. Taylor*, 834 F.2d 1213, 1219 (5th Cir. 1988) (reversing district court's ruling that seizure of truck was reasonable where "minimal further investigation" would have shown it was not stolen).

Andros's alibi was not flawless. Witness accounts as to when he left the Beach Bar varied widely enough that the arresting officers might reasonably have thought Andros arrived home as early as 3:45 or 4 a.m.[1] Meanwhile, the time of death evidence available at the time also was not as conclusive as Andros would have us believe. The medical examiner's statement to investigators that Ellen Andros must have died between 1:45 and 2:15 a.m. was in part predicated on their report that she was automatically signed off her internet account around 2:20 a.m., information that was thrown into serious doubt by America Online's later verification that Ellen had actively logged off. Even the medical examiner's less specific estimate that Ellen Andros died between two

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[1] The District Court rested its ruling on the lack of definitive evidence confirming that Andros had not left the Beach Bar for the forty-five minutes it would have taken him to get home before 4 a.m., murder his wife, and return. Although the defendants did not proffer the theory that Andros left and returned to the bar, our inquiry into probable cause is an objective one, independent of what the investigators subjectively believed. *See Blaylock v. City of Philadelphia*, 504 F.3d 405, 411 (3d Cir. 2007). Still, since we find the defendants' own theory that Andros murdered Ellen upon returning home from the bar at 4 a.m. to be reasonable in light of the evidence available at the time, we need not address this alternative scenario.

and five hours after her last meal at 10 p.m., and thus was "highly unlikely" to have died at 4 a.m., did not render it logically impossible that she was killed by Andros when he arrived home around that time. Moreover, personnel from the county medical examiner's office had made conflicting observations as to some of the other physical evidence, such as the body's level of rigor.

Given the defendants' foundational beliefs – that Ellen Andros was the victim of a homicide, that the murderer was able to enter the house without breaking in, that Ellen did not struggle even enough to wake up her daughters in the same room, and that Andros had in the past treated Ellen abusively and even threatened her life – it was reasonable for them to rely on the possibility that the medical examiner's time of death estimate was not perfect and conclude that Andros murdered Ellen when he returned home around 4 a.m. Though witness accounts and medical evidence made this scenario unlikely, it was not impossible. In hindsight, with the knowledge that Ellen's death was accidental, the defendants' theory may seem unconvincing, but at the time it provided the only reasonable explanation of Ellen Andros's death. *See Graham v. Connor*, 490 U.S. 386, 396 (1989) ("The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."); *Gilles v. Davis*, 427 F.3d 197, 207 (3d Cir. 2005) ("The reasonableness of the officer's belief should be judged from that on-scene

perspective, not with the perfect vision of hindsight.").

Finally, Andros contends that the police unreasonably failed to pursue the possibility that Calvin Gadd, Ellen's "secret boyfriend," (Appellees' Br. at 12) might have committed the murder. Gadd told the police that he had been home with his son that night and that no one could verify his whereabouts, a statement that was accepted without further investigation. However, "the law does not require that a prosecutor explore every potentially exculpatory lead before filing a criminal complaint or initiating a prosecution." *Trabal v. Wells Fargo Armored Serv. Corp.*, 269 F.3d 243, 251 (3d Cir. 2001). Additionally, in light of our knowledge that Ellen died of natural causes, it is clear that even the most thorough follow-up on Gadd's story would not have revealed that he committed the murder instead of Andros.

Overall, we are satisfied with the District Court's conclusion that a reasonable jury could not find that the above circumstances were insufficient to support a reasonable belief that Andros had murdered his wife. *See Sherwood v. Mulvihill*, 113 F.3d 396, 401 (3d Cir. 1997) ("The district court may conclude in the appropriate case . . . that probable cause did exist as a matter of law if the evidence, viewed most favorably to Plaintiff, reasonably would not support a contrary factual finding."). The defendants' conclusion was a reasonable one based on the facts available at the time, even if it would later prove incorrect.

C.

The District Court ruled that Andros's complaint failed Rule 8(a)(2)'s notice pleading standard with respect to his federal and state claims of deprivation of due process through interference with the family relationship. In so doing, the District Court did not impose a heightened pleading standard on the plaintiff. Andros's allegations regarding the roles of Blitz, Talasnik, and DeShields in his child custody proceedings, themselves relatively vague, fail to take the necessary step of pleading a core element of his claims: how the defendants' actions, right or wrong, subverted the due process afforded to Andros in the form of a procedurally proper custody hearing. Without information on that key aspect of the familial interference claims, the defendants' ability to assert any relevant defenses, such as qualified immunity or failure to state a claim, was compromised.[2] *In re Tower Air, Inc.*, 416 F.3d 229, 237 (3d Cir. 2005) ("A plaintiff should plead basic facts, such as they are, for those are 'the grounds' upon which the plaintiff's claim rests. Even at the pleading stage, a defendant deserves fair notice of the general factual background for the plaintiff's claims.").

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[2] Notably, Andros did not take advantage of his opportunity to amend these claims to include more specific factual allegations as to this issue.

III.

For the foregoing reasons, we affirm the judgment of the District Court.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-2259

JAMES L. ANDROS, III, individually and as
Father and Natural Guardian
on behalf of xxx and xxx, minors,

Appellant

v.

M.D. ELLIOT M. GROSS; BRUCE K. DESHIELDS,
SGT.; ELADIO ORTIZ, LT.; JEFFREY S. BLITZ,
ESQUIRE; MURRAY TALASNIK, ESQUIRE;
M.D. HYDOW PARK; BARBARA FENTON;
COUNTY OF ATLANTIC; STATE OF NEW JERSEY;
JOHN DOE, INVESTIGATORS 1-50, individually,
jointly, severally and in the alternative;
CHRISTOPHER WELLMAN, CPT.

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 03-cv-01775)
District Judge: Honorable Jerome B. Simandle

Submitted Under Third Circuit L.A.R. 34.1(a),
September 11, 2008

Before: SLOVITER, FUENTES, and
ALDISERT, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit L.A.R. 34.1(a) on September 11, 2008. On consideration whereof, it is now here

ORDERED and ADJUDGED by this Court that the Orders of the District Court entered on February 23, 2004 and December 21, 2005, be and the same are hereby AFFIRMED. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron
Clerk

Dated: September 22, 2008

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JAMES ANDROS, III, individually and as Natural Father and Guardian of xxx and xxx, minors, Plaintiffs, v. ELLIOT M. GROSS, M.D., BRUCE K. DESHIELDS, ELADIO ORTIZ, JEFFREY BLITZ, ESQUIRE, MURRAY A. TALASNIK, ESQUIRE, HYDOW PARK, M.D., BARBARA FENTON, COUNTY OF ATLANTIC, STATE OF NEW JERSEY, Defendants.	HON. JEROME B. SIMANDLE Civil No. 03-1775 (JBS) **OPINION**

APPEARANCES:

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SIMANDLE, District Judge:

The parties in this lawsuit agree that plaintiff James L. Andros, III, was wrongly charged with first degree murder after his wife died suddenly on March 31, 2001. With this lawsuit, Mr. Andros seeks relief for himself, and for his two minor children, for the harm they suffered because of the wrongful charge.

Ellen Andros was a seemingly healthy thirty-one year old when she died in the early morning hours of March 31, 2001. Defendant Elliot M. Gross, M.D., an Atlantic County Medical Examiner, performed an

autopsy that day and ruled, incorrectly, that her death was a homicide from "asphyxia due to suffocation." His ruling prompted a homicide investigation which uncovered evidence that implicated Mr. Andros, including reports from friends and family that there was great marital discord between plaintiff and Ellen which, at times, involved plaintiff threatening violence to Ellen. Presented with this evidence, on June 5, 2001, a grand jury indicted plaintiff for one count of first degree murder.

Throughout the proceedings, plaintiff consistently maintained that he was innocent and argued that his wife must have died from natural causes, such as from her chronic tonsillitis condition. In preparation for trial, therefore, the Atlantic County Prosecutor's Office retained a pathologist, Dr. Donald Jason, to consider the evidence and review Dr. Gross's autopsy report, so he could testify as an expert witness at trial. After reviewing the evidence, though, Dr. Jason disagreed with Dr. Gross, instead concluding on November 30, 2002 that Ellen Andros died from a spontaneously dissecting coronary artery, a natural cause of death that "has been reported in about 150 cases since 1931." (*See* Jason Report, Clarke Cert, Ex. H.)

Dr. Gross was asked to revisit his autopsy conclusion and, on December 3, 2002, wrote that "I am now of the opinion, with reasonable medical certainty, that the cause of Mrs. Andros' death is the rare condition referred to as Spontaneous Coronary Artery Dissection and the manner of her death is natural."

(Gross 12/3/2002 Ltr., Clarke Cert., Ex. I.) The following day, December 4, 2002, the indictment against plaintiff was dismissed.

On April 22, 2003, plaintiff filed the present thirty-seven count Complaint in this Court, seeking relief for himself individually, and for his minor children xxx and xxx, for damages suffered because of the false charge. In his Complaint, plaintiff alleges that he was wrongly charged because defendants conspired to "create, orchestrate and fabricate a prosecution" against him by "concoct[ing] a motive for plaintiff to have killed his wife," by "ignor[ing] or conceal[ing] the medical, physical, and testimonial evidence to the contrary," and by "distort[ing], alter[ing] or misrepresent[ing] that medical, physical and testimonial evidence." (*See* Compl. ¶¶32, 44.) Defendants include Elliot M. Gross, M.D., the Atlantic County Medical Examiner who initially ruled the death a homicide, Hydow Park, M.D., the Atlantic County Chief Medical Examiner who was Dr. Gross's supervisor, Barbara Fenton, the Atlantic County Medical Examiner's assistant who assisted Dr. Gross, Bruce K. DeShields and Eladio Ortiz, two members of the investigative section of the Atlantic County Prosecutor's Office who were assigned to the homicide investigation, Jeffrey S. Blitz, Esquire, Atlantic County Prosecutor, and Murray A. Talasnik, Esquire, Atlantic County First Assistant Prosecutor, who prosecuted the case against plaintiff, as well as the State of New Jersey and County of Atlantic.

Presently before the Court are three motions, the motion of medical examiner Elliot M. Gross, M.D. to dismiss the claims against him in Counts 2, 7, 21, 28, 29, and 33, the motion of defendants Dr. Hydow Park, Barbara Fenton, and the County of Atlantic to dismiss the claims against them in Counts 14, 22, 30, and 31, and the motion of defendants Blitz, Talasnik, Ortiz, DeShields, and the State of New Jersey for summary judgment as to all claims against them.[1]

These motions require the Court to consider two basic issues: (1) whether plaintiffs have alleged viable claims for violation of their constitutionally protected right of family association, and (2) whether defendants Dr. Gross, Dr. Park, Barbara Fenton, Prosecutors Blitz and Talasnik, Investigators Ortiz and DeShields, and the State of New Jersey, have immunity from claims asserted in this action.

The Court has considered the arguments of the parties, including their oral arguments made on November 5, 2003, and will, for the following reasons, dismiss the family interference claims without prejudice to plaintiffs' right to replead the claims with greater specificity within thirty days, will dismiss the

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[1] Plaintiffs have agreed to the voluntary dismissal of certain claims, as reflected in this Court's November 6, 2003 Order. The dismissed counts are the abuse of process claims against defendant Gross in Counts 25, 26, and 27, the respondeat superior claim against the County of Atlantic in Count 35, and the false imprisonment claim against defendants DeShields, Blitz, and Talasnik in Count 4. [Docket Item 38-1.]

negligence claims asserted against Dr. Gross to the extent that they seek relief for his misrepresentation of the cause of Ellen's death, but will not dismiss them to the extent that they assert Dr. Gross was negligent in undertaking other duties owed to plaintiffs. The Court also will not dismiss the section 1983 claim against Hydow Park, M.D., or the negligence claim against Barbara Fenton, because factual issues remain regarding their immunity from the claims, and will not dismiss the state claims asserted against Bruce DeShields, Eladio Ortiz, Jeffrey Blitz, and Murray Talasnik, other than the warrantless search claim (Count 18), and the invasion of privacy claim (Count 19), because defendants cannot invoke federal immunity against these state claims. The Court will dismiss, because of federal immunity, all federal claims asserted against defendants Blitz, Talasnik, DeShields, and Ortiz, and the Court will dismiss all claims against the State of New Jersey. The Court will explain these findings herein.

I. BACKGROUND

A. The Events of March 31, 2001

According to his Complaint, plaintiff James Andros, III, an Atlantic City police officer, stayed at the Beach Bar & Grill in Brigantine, New Jersey until the final call on Saturday, March 31, 2001, and then returned to his Pleasantville, New Jersey home at about 4:20 a.m. (Compl. ¶¶14, 19.) He thought that his wife, Ellen, and daughters, xxx and xxx, were

staying at Ellen's parents' house in Pennsauken, New Jersey that night, as they generally stayed there on Friday nights after xxx and xxx had piano and ballet lessons. (*Id.* ¶¶14-15.) When he arrived at the house, though, he found that Ellen's car was in the driveway and that lights were on in the house. (*Id.* ¶19.) He entered and found Ellen sitting in a chair in front of her computer; she did not respond to his greeting, so he approached and found that she was "unresponsive and bluish in color." (*Id.*) He attempted to resuscitate her without success, and then called 9-1-1 at 4:27 a.m. (*Id.*)

Personnel from the Pleasantville Fire and Police Departments arrived at the scene and confirmed Ellen Andros' death. (*Id.* ¶20; Kent Cert., Exs. 10-13, 15-16.) The Pleasantville Police, pursuant to their general practice, contacted the Atlantic County Sheriff's Office, who contacted the Atlantic County Prosecutor's Office and the Atlantic County Medical Examiner's Office. (Compl. ¶21.) At about 6:45 a.m., defendant Barbara Fenton, a registered nurse and investigator for the Atlantic County Medical Examiner, arrived at the Andros home. (*Id.* ¶22; Kent Cert., Exs. 19, 30.) Soon thereafter, Investigators Larry Wade and Stan Yates, and defendant Sergeant Bruce DeShields of the Major Crimes division of the Atlantic County Prosecutor's Office, arrived at the scene. (Compl. ¶23; Kent Cert., Ex. 18; Clarke Cert., Ex. B at 1.) Defendant Elliot M. Gross, M.D., Atlantic County Medical Examiner, then arrived at about 9:10 a.m. and investigated the scene. (Compl. ¶24; Kent

Cert., Ex. 21.) Neither Dr. Gross nor Barbara Fenton had a thermometer so they were unable to record an exact body temperature, though Ms. Fenton noted that "the extremities were cool while the body was warm." (Compl. at ¶¶22, 24; Kent Cert., Ex. 19 at 3.)

Dr. Gross then arranged for Ellen Andros' body to be transported to the Atlantic County Medical Examiner's Office, (*id.* ¶23), where he conducted an autopsy from about 11:00 a.m. until about 2:30 p.m., (*id.* ¶25). He concluded that Ellen Andros's death was a homicide from "asphyxia due to suffocation." (*Id.* 1124-25; Clarke Cert., Ex. A; Kent Cert., Ex. 22.) Plaintiff alleges that Dr. Gross issued this conclusion prior to "obtaining the results of toxicology tests or reviewing Ellen's medical records." (Compl. ¶25.)

Plaintiff alleges that Dr. Gross then met with defendants Hydow Park, M.D., Jeffrey Blitz, and Murray A. Talasnik, to "brainstorm" how they could "manipulate" the evidence to make it appear that plaintiff had murdered his wife. (*Id.* ¶42.) Plaintiff asserts that by this time, there was "mounting, overwhelming evidence that plaintiff could not have caused his wife's death or even have been present at the time thereof," but that defendant Blitz wanted to further his "personal and political agenda" by charging plaintiff with the crime. (*Id.* ¶44.)

Dr. Gross did reexamine the body at 3:30 p.m. on April 1, 2001 "in the presence of Investigator Yeats from Atlantic County Prosecutor's Office, Major Crimes Unit." (Clarke Cert., Ex. A at 8; Kent Cert.,

Ex. 22 at 8.) He "made additional observations, performed additional toxicology and histology procedures," and then issued a supplemental report which again concluded that Ellen Andros died from "asphyxia due to suffocation." (Compl. ¶25.)

B. The Homicide Investigation

Dr. Gross' conclusion that Ellen Andros' death was a homicide launched a criminal investigation. (*Id.* ¶48.) The investigation produced certain evidence which exculpated plaintiff. First, witnesses placed plaintiff at the Beach Bar and Grill in Brigantine from about 9:00 p.m. until 4:00 a.m., (*id.* ¶¶14, 35), while other evidence indicated that Ellen died between 2:00 and 2:30 a.m., (*id.* ¶¶18,39.) Computer records showed that she sent an e-mail at 1:48 a.m. and that her America On-Line account was logged off "due to inactivity" at about 2:30 a.m. (*Id.* ¶¶18, 38; Kent Cert., Ex. 8 at 3.) Medical evidence supported the 2:30 a.m. time of death as she likely died two hours prior to the arrival of emergency personnel at 4:31 a.m. when the first responders noted cold extremities and lividity, (Compl. ¶¶20, 22, 24, 39; Kent Cert., Ex. 16 at 7, *id.*, Ex. 36 at 5), three to four hours after her last meal, which she finished between 10:00 and 10:30 p.m., (*id.* ¶39, Kent Cert., Ex. 7 at 3), and four hours prior to Barbara Fenton's arrival around 7:00 a.m. when she noted the presence of +4 rigor mortis in the neck and jaw, blanching livor on the face, mottling on upper arms, and thick livor on

dependent areas of the body, (Compl. ¶39; Kent Cert., Ex. 19).

Second, plaintiff explained that he was at the bar that Friday night because he had worked the night shift on Thursday and slept during the day on Friday, and because he thought that his wife and daughters xxx and xxx were spending the night with Ellen's parents, Edward and Betty Ann Clark, in Pennsauken, New Jersey, as was usual. (*Id.* ¶¶14-15.) Plaintiff told investigators that he, therefore, could not have murdered his wife because he did not know that his wife was home. Ellen Andros had visited her parents that night with xxx and xxx, but they had returned home to Pleasantville at about 12:30 a.m. (*Id.* ¶¶17-18; Kent Cert., Ex. 7 at 1-4.)

Third, Ellen Andros' body showed no signs of struggle. No scratches, bruises, or other signs of physical trauma were found on her body, and her fingernails, contact lenses, and clothes remained intact. (Compl. ¶40; Kent Cert., Ex. 22.) Plaintiff himself, when viewed at the scene was also "devoid of any signs that he had been involved in any struggle or any other act of manual physical force upon another person." (Compl. ¶41.) xxx and xxx were found asleep in the same room where Ellen died, and xxx told investigators that she was "not aware of any unusual behavior or occurrences in the home that evening and did not wake up until she heard . . . her father pretending to cry." (*Id.* ¶28; Kent Cert., Ex. 24.)

Fourth, Dr. Gross' findings were not entirely consistent. First, he found that Ellen Andros was asphyxiated because there were pre-mortem petechiae in her eyes and face; then he found that the asphyxiation must have been by suffocation, and not by strangulation, because there was no trauma to her neck. (Compl. ¶37.) Pre-mortem petechiae, however, generally occur only in strangulation cases, and not suffocation cases, as they are caused by the manual compression of the neck. (*Id.*)

The investigation also uncovered certain evidence which implicated plaintiff. First, though several witnesses were able to place plaintiff at the Beach Bar and Grill during the early morning hours of March 31st, no one witness could verify that plaintiff was at the bar the entire 9:00 p.m. until 4:00 a.m. period as he said. The bar's manager, Joseph Takach, told police that he thought plaintiff arrived around 1:00 a.m. and left around 3:45 a.m. (Kent Cert., Exs. 3, 28.) Plaintiff's friend, Christopher Howe, though, said that plaintiff was at the bar when he arrived around 11:00 p.m. and that he thought he stayed until "approximately 4:00 a.m." (Kent Cert., Exs. 5, 26.) The bartender, Tania Grossman also remembered that plaintiff had entered the bar around 11:00 p.m., but she thought he left "just before 3:30 a.m." (Kent Cert., Exs. 9, 27.) Another friend of plaintiff's, Brian Keena, said that he saw plaintiff at the bar and that he left between 2:00 and 3:00 a.m., but that he did not know when plaintiff left. (Kent Cert., Ex. 4.) Plaintiff's father told police that plaintiff had left the

bar "little bit before me, I don't know exactly when" because he was so inebriated by that time that he spent the night in his truck in the bar's parking lot. (Kent Cert., Ex. 2 at 2.) Defendants, therefore, did not feel that plaintiff's alibi was tight.

Second, investigators found the reactions of plaintiff and his in-laws to be suspicious at the scene. Investigators reported that plaintiff was intoxicated when they arrived at the scene, and that he "showed no change of emotion when told that the death was ruled a homicide." (Clarke Cert., Ex. B at 2, 7; Kent Cert., Exs. 11, 14, 15, 17, 18.) They also said that when Ellen's mother arrived at the scene, she looked directly at plaintiff and asked, "did you kill her." (Clarke Cert., Ex. B, Brown Police Report; Kent Cert., Ex. 17, Seliga Report at 4.)

Third, there did not seem to be any indication that Ellen would have died from natural causes. She had been, by all accounts, a healthy thirty-one year old with no history of drinking, drugs, or smoking, and with no complaints of illness, other than a chronic tonsilitis condition. (*Id.*, Ex. B, Harper Police Report.) She had seen her parents that night and had not complained about any medical problems, (Kent Cert., Ex. 7 at 11), and tested negative for the presence of drugs in her system, (*id.*, Ex. 23).

Fourth, the house showed no sign of forced entry and no indication that anyone had been in the house that night other than plaintiff, Ellen, and the children. Therefore, the perpetrator needed to have ready

access to the house, which plaintiff had. Also, there was no evidence of a struggle, which defendants believed meant that Ellen was murdered by someone with whom she was very familiar, such as her husband.

Fifth, investigators learned that plaintiff and Ellen were estranged. Ellen's friend, Sharon Hogan, told police that "Ellen and Jim slept in different parts of the residence" and that "Ellen had talked about leaving Jim for quite some time," but that he "was very controlling" and "would always tell her that he would get custody of the girls." (Clarke Cert., Ex. B, Hogan Report.) Two other friends, Julie Goldberg and Viola McElroy, also told police that "Ellen was unhappy in her marriage and was looking to get out," but that she "was afraid to." (*Id.*, Goldberg Report; *id.* McElroy Report.) The night before her death, Ellen told Mr. Gadd that she would talk to her mother during the Friday visit about whether she could move into their home. (*Id.*, Gadd Report.)

Finally, investigators learned that plaintiff had physically threatened Ellen in the past. Calvin Gadd told investigators that Ellen said that "Jim would tell her that he could kill her and make it look like an accident." (*Id.*, Gadd Report.) Mr. Gadd and another friend, Mary Ann Bakogiannis, reported that plaintiff had threatened Ellen with a gun. Mr. Gadd said that Ellen told him that "Jim put a gun to her head and told her how easy it would be for him to pull the trigger," (*id.*); Mrs. Bakogiannis said that Ellen told her that "Jim had come home from work and . . . took

out his weapon and started twirling it around his finger. He then took the gun and pointed it at Ellen's head and said 'Bang,'" (*id.*, Bakogiannis Report). Mr. Gadd reported another incident where Ellen said that she was in the car with plaintiff and he "drift[ed] to the side of the road and t[old] Ellen he could crash into something, kill her and make it look like an accident." (*Id.*, Gadd Report.) Finally, in an incident that investigators found especially probative, Mrs. Bakogiannis reported that Ellen told her that one time when "she and Jim were being intimate, . . . Jim put his hand over her nose and mouth so she could not breathe." (*Id.*, Bakogiannis Report.) She said that she was able to get away from plaintiff, but that she was very frightened because plaintiff "looked at her with a dead stare as he held his hand over her nose and mouth." (*Id.*) Ellen apparently then said that "she would never be intimate with Jim again." (*Id.*) Ellen had not reported any of these incidents because, according to Mr. Gadd, "she was afraid that Jim would either lose his job or nothing would be done and she would put herself and the girls in harms way." (*Id.*, Gadd Report.)

On April 23, 2001, First Assistant Prosecutor Murray Talasnik, who had been placed in charge of the case by Atlantic County Prosecutor Jeffrey Blitz, obtained a warrant for plaintiff's arrest. (Clarke Cert., Ex. C.) The Honorable Michael Connor explained that "I'm satisfied, from the testimony, that the circumstantial evidence would give rise to the requisite probable cause for the issuance of an arrest

warrant and I will sign that warrant." (*Id.* at Tr. 3.) Plaintiff was arrested and incarcerated. (Compl. ¶47.) He lost his job with the Atlantic City Police Department and lost custody of his children, xxx and xxx. (*Id.* ¶¶47-57.)

C. The Grand Jury Proceeding

On June 5, 2001, defendant Talasnik presented the case to the Grand Jury, (Clarke Cert., Ex. D), and the Grand Jury voted to indict plaintiff for one count of first degree murder, (*id.*, Ex. E). In this lawsuit, plaintiff asserts that the defendants lied to the Grand Jury about the time of Ellen's death "in order to secure an indictment of Jim Andros." (Pls.' Br. at 16.) Therefore, this Court will limit its discussion of the Grand Jury proceeding to the testimony relating to the time of death evidence.

Before the Grand Jury defendant Talasnik questioned defendant DeShields about the time that Ellen Andros died. Their first interchange on the topic proceeded as follows:

> Q. And does Betty Ann Clark have specific memory of Ellen calling her?
>
> A. Yes, sir. She indicated that she had fallen asleep when the phone rang, but she believes it was maybe a little after 12:30 that Ellen had called her and told her that she had got the girls to bed and that she was home.

Q. This would have been about 12:30 then on Saturday morning, the 31st?

A. Yes, sir.

Q. *Four hours before Ellen dies?*

A. *Yes, sir.*

Q. And the substance of that phone call from Ellen was that she was home and everything was fine?

A. Yes, sir.

(Clarke Cert., Ex. D, Tr. at 31-32) (emphasis added). A juror then asked, "[w]as the Medical Examiner able to determine the time of death," (*id.* at 34), so Talasnik and DeShields continued:

Q. Now with respect to the investigation done by the Medical Examiner, is there a specific indication as to the precise time of death?

A. No, sir.

Q. And is that fairly common that a Medical Examiner cannot pinpoint the time of death on any medical investigation that he does?

A. Yes, sir, that's correct.

Q. We know, however, that Ellen was alive at about 12:30 in the morning; that's when she called her mother?

A. Yes, sir.

> Q. Was there some indication in examining the computer that she was alive even closer in time to 4:37 when the 911 call was placed?
>
> A. Yes, sir. I believe it was approximately 2:40 in the morning. She had sent an e-mail to a friend of hers.

(Clarke Cert., Ex. D, Tr. at 41-42.)

Plaintiff moved to dismiss the indictment, arguing that the State made "material misrepresentations of fact" which misled the jury into thinking that plaintiff was home when Ellen died. (*Id.*, Ex. F(1).) His attorney argued on September 7, 2001 that:

> The first thing that the State does in its presentment is it concedes that they could not pinpoint a time of death, that the Medical Examiner could not give an exact time of death. . . .
>
> What the State then sought to establish is some sort of flimsy timeline as to the events in this case. The State establishes that at 12:30 Ellen Andros was alive because she made a phone call to her mother and that was 12:30 in the morning. The State then establishes that at 2:40 a.m. she was alive based upon an e-mail that she had sent to a screen name RRTTRAUMA. That was a misrepresentation by Sergeant DeShields as to the time that that e-mail was sent. . . . In

> actuality, that e-mail was sent at 1:48 in the morning.[2] . . .
>
> Judge, the State then established that Mr. Andros was home at 4:00 or sometime after 4:00, perhaps 4:15 or 4:20 based upon approximate times of travel. . . . The problem then is at the conclusion of the State's questioning on its initial presentment with Sergeant DeShields, the State says the phone call was made at 12:30 a.m., isn't that correct? Yes. Four hours before Ms. Andros died. The State has now blatantly told the Grand Jury that Ms. Andros died at 4:30, although there is absolutely no foundation in the record based upon any of the facts or based upon the medical science that Ms. Andros passed away at that time.

(*Id.* at 11-14.)

The Honorable Manuel H. Greenberg considered this time of death argument, but denied plaintiff's motion because DeShields had explicitly told the jury that there was no evidence which defined the exact time of death. Judge Greenberg explained that:

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[2] Defendant Talasnik later explained that DeShields likely stated that the e-mail was sent around 2:40 a.m., rather than at 1:48 a.m., because there were two copies of the e-mail which showed different times. The e-mail retrieved from the Andros computer indicated it was sent at 1:48 a.m., which the prosecution eventually determined was correct. The e-mail retrieved from the receiving computer, though, indicated that it was sent at 2:48 a.m., because the computer had automatically adjusted the time for daylight savings. (Clarke Cert., Ex. F(1) at 26.)

> based upon the arguments, based upon the documents, based upon what was presented to the Grand Jury, I certainly cannot find that the State willfully or otherwise deceived the Grand Jury in any material respect . . . in sum, I find that the Grand Jury presentation was a fair presentation and I cannot find that the prosecutor deceived the Grand Jury or that the prosecutor failed in his obligation to present exculpatory evidence to the Grand Jury and, therefore, I will deny the motion.

(*Id.* at 36-37; *see also* Clarke Cert., Ex. F(2)).

D. A Natural Cause of Death

Plaintiff maintained his innocence throughout the criminal proceedings, consistently arguing that he was at the Beach Bar & Grill at the time of Ellen's death and that her death must have been the result of "natural causes." As a result, First Assistant Prosecutor Talasnik contacted Dr. Marc R. Rosen, an attending physician at Jefferson Medical Center, early on in the investigation to determine whether Ellen's chronic tonsillitis condition could have caused her death. Dr. Rosen reported on October 26, 2001 that "Ellen Andros' asphyxiation was not caused by obstruction of her upper airway by either her tonsils or an acute infectious process." (Clarke Cert., Ex. G.)

Then, just prior to trial, First Assistant Talasnik contacted Dr. Donald Jason, another pathologist, and asked him to review "materials pertaining to the death of Ellen Andros," including Dr. Gross' autopsy

conclusion, so that he could serve as a potential expert witness at trial. (Clarke Cert., Ex. H.) Dr. Jason sent his report on November 30, 2002, in which he found that Ellen Andros had not been murdered. He reported that "the cause of death of Ellen Andros was Spontaneous Coronary Artery Dissection affecting her left anterior descending coronary artery, a natural disease condition." (*Id.* at 6.)

Dr. Jason admitted that Ellen's physical condition initially indicated to him that her death may have been by asphyxiation, but that when he then "examined the glass microscopic slides, starting with Slide A, I was surprised to discover a natural cause of death." (*Id.* at 7.) She had died from a condition that has been:

> described as rare but has been reported in about 150 cases since 1931. Most of these have been women, about a quarter of those during the third trimester of pregnancy or the early postpartum period. . . . Most cases present with sudden death. The cause of this condition is unclear.

(*Id.* at 8.)

Upon receiving the report, First Assistant Talasnik forwarded it to Atlantic County Chief Medical Examiner Hydow Park, M.D. on December 2, 2002, asking for his "opinion regarding the conclusion of Dr. Jason as it relates to the death of Ellen Andros" and requesting an answer by "tomorrow morning" because "[a]s you can well understand, time is of the essence."

(Clarke Cert., Ex. I at 1.) On December 2, 2002, Dr. Park wrote that he was "in agreement with Dr. Jason's conclusion that the cause of death was a spontaneous coronary artery dissection" and that "[i]t is very unfortunate that Dr. Gross apparently failed to identify the dissecting hemorrhage in the coronary artery." (*Id.* at 2.) On December 3, 2002, Dr. Gross also wrote that he concurred with Dr. Jason's conclusion after he "re-examined the microscopic slides" and that he would be "preparing a correction of the certificate of death as originally issued to reflect the above opinions." (*Id.* at 3.)

Prosecutor Blitz and First Assistant Prosecutor Talasnik then filed a motion to dismiss the indictment against plaintiff, which was granted by the Honorable Albert Garofalo on December 4, 2002. (Clarke Cert., Ex. J.) Plaintiff's suspension from the Atlantic City Police Department was lifted and he was given back pay for his time of suspension in 2001 and 2002. (Clarke Cert., Ex. L.)

E. Procedural History

Plaintiff then filed a Complaint in this Court on April 22, 2003, seeking relief for himself individually, and on behalf of his minor children xxx and xxx, for harm that they suffered because, he says, defendants strategized and conspired to create, distort, ignore, or conceal evidence in order to maintain and bolster the "obvious false conclusion" that he had killed his wife. (*See, e.g.* Complaint ¶32.) Presently before the Court

are three motions: (1) the motion to dismiss filed by defendant Elliott Gross, M.D., seeking dismissal of the claims in nine of the twenty counts asserted against him,[3] (2) the motion to dismiss filed by defendants County of Atlantic, Hydow Park, M.D., and Barbara Fenton, seeking dismissal of the claims in five counts of plaintiffs' complaint,[4] and the motion for

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[3] Dr. Gross does not presently seek dismissal of the claims asserted against him in the following counts:

1. Malicious Prosecution, § 1983;
3. Defamation, § 1983;
4. False Imprisonment, § 1983;
5. Conspiracy, § 1983;
6. Malicious Prosecution, State Constitution;
8. Malicious Prosecution, Common Law;
10. Conspiracy, Common Law;
11 Aiding and Abetting, Common Law;
20. Invasion of Privacy/False Light;
32. Intentional Infliction of Emotional Distress;
37. Punitive Damages.

Dr. Gross sought dismissal of plaintiff's abuse of process claims in Counts 25, 26, and 27, arguing that the claims must be dismissed because plaintiffs alleged improper issuance of process, not improper use of process after its issuance. *See Jennings v. Shuman*, 567 F.2d 1213, 1218-19 (3d Cir. 1977). Plaintiffs agreed to the voluntary dismissal of these claims. *See* 11/6/2003 Order.

[4] With this motion, defendants Park and Fenton seek dismissal of all claims asserted against them, and defendant Atlantic County seeks dismissal of two of seven claims asserted it. Atlantic County does not presently seek dismissal of claims asserted against it in the following counts:

12. Deliberate Indifference, Conscious Disregard, § 1983

(Continued on following page)

summary judgment filed by defendants State of New Jersey, Bruce DeShields, Eladio Ortiz, Jeffrey Blitz, and Murray Talasnik, seeking summary judgment in their favor as to all claims asserted against them in plaintiffs' complaint.[5]

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13. Deliberate Indifference, § 1983

23. Negligent Hiring/Supervision

34. Respondeat Superior (for acts of Gross and Fenton)

Atlantic County sought dismissal of the respondeat superior claim asserted against it in Count 35, arguing that it is not responsible for the actions of DeShields and Ortiz because they were not employees of the County and were not under the direction or control of the County. Plaintiffs agreed to the voluntary dismissal of the respondeat superior claim in Count 35 as to the County of Atlantic only. *See* 11/6/2003 Order.

[5] The Counts which allege claims against defendants DeShields ("D"), Ortiz ("O"), Blitz ("B"), Talasnik ("T") and State of New Jersey ("NJ") are:

By plaintiff James Andros individually:

1. Malicious Prosecution, § 1983 (D, B, T)
2. Interference with Family Relations, § 1983 (D, B, T)
3. Defamation, § 1983 (D, B, T)
4. False Imprisonment, § 1983 (D, B, T)
5. Conspiracy, § 1983 (D, B, T)
6. Malicious Prosecution, State Constitution (D, B, T)
7. Interference with Family Relations, State Constitution (D, B, T)
8. Malicious Prosecution, Common Law (D, B, T)
9. Defamation, State Constitution (D, B, T)
10. Conspiracy, Common Law (D, B, T)
11. Aiding and Abetting, Common Law (D, B, T)
15. Supervisory Liability, § 1983 (B)

(Continued on following page)

II. STANDARDS OF REVIEW

A. Motions to Dismiss

Motions to dismiss the Complaint for failure to state a claim have been addressed to certain counts, as noted above, by defendant Gross and also by defendants Atlantic County, Park, and Fenton. The

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16. False Arrest, False Imprisonment, Common Law (D, B, T)
17. Warrantless Searches, Federal Constitution (D, O)
18. Warrantless Searches, State Constitution (D, O)
19. Invasion of Privacy, Common Law (D, O)
20. Invasion of Privacy, False Light (B, T)
24. Negligence (D, B, T)
25. Abuse of Process, § 1983 (D, B, T)
26. Abuse of Process, State Constitution (D, B, T)
27. Abuse of Process, Common Law (D, B, T)

By plaintiff Andros on behalf of xxx and xxx:

28. Interference with Family Relations, § 1983 (D, B, T)
29. Interference with Family Relations, State Constitution (D, B, T)

By all plaintiffs:

32. Intentional Infliction of Emotional Distress (D, B, T)
35. Respondeat Superior for acts of DeShields, Ortiz (NJ)
36. Respondeat Superior for acts of Blitz, Talasnik (NJ)
37. Punitive Damages (D, B, T)

Defendants sought dismissal of the false imprisonment claim asserted against defendants DeShields, Blitz and Talasnik in Count 4, arguing that it was not a viable cause of action "because plaintiff was arrested and imprisoned pursuant to legal process." *See Morales v. Busbee*, 972 F. Supp. 254, 266 (D.N.J. 1997). Plaintiff agreed to the voluntary dismissal of this claim. *See* 1/6/2003 Order.

Court must deny a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). A district court must accept any and all reasonable inferences derived from the facts and must view all allegations in the complaint in the light most favorable to the plaintiff. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994).

The plaintiff does not need to plead evidence or plead the facts that are the basis for the claim. *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977); *In re Midlantic Corp. Shareholder Litig.*, 758 F. Supp. 226, 230 (D.N.J. 1990). The question before the court is not whether plaintiffs will ultimately prevail; rather, it is whether they can prove any set of facts in support of their claims that would entitle them to relief. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). Therefore, in deciding a motion to dismiss, a court should look to the face of the complaint and decide whether, taking all of the allegations of fact as true and construing them in a light most favorable to the nonmovant, plaintiff's allegations state a legal claim. *Markowitz*, 906 F.2d at 103.

B. Motion for Summary Judgment

Defendants State of New Jersey, Bruce DeShields, Eladio Ortiz, Jeffrey Blitz and Murray Talasnik, as noted above, seek summary judgment on all claims against them. Summary judgment is appropriate when the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is "material" only if it might affect the outcome of the suit under the applicable rule of law. *Id.* In deciding whether there is a disputed issue of material fact, the court must view the evidence in favor of the non-moving party by extending any reasonable favorable inference to that party. *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999).[6]

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[6] The moving party always bears the initial burden of showing no genuine issue of material fact exists, regardless of which party ultimately would have the burden of persuasion at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). However, where the nonmoving party bears the burden of persuasion at trial, "the burden on the moving party may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case.' *Id.* at 325. The non-moving party "may not rest upon the mere allegations or denials of" its pleading to show a genuine issue exists and must do more than rely only "upon bare assertions, conclusory allegations or suspicions." Fed.

(Continued on following page)

III. DISCUSSION

There are two main issues present in the motions before the Court. First, the Court must determine whether plaintiffs' familial association allegations state a claim for relief; second, the Court must decide whether the defendants enjoy immunity from claims in this suit.

A. Familial Association Claims[7]

First, this Court finds that the familial association claims must be dismissed because the allegations in the Complaint are too vague to allow this Court to accurately determine the basis for the claims, and thus, their viability. The Court's dismissal of the claims is without prejudice to the plaintiffs' right to reassert the claims in an Amended Complaint filed within thirty days that sets forth the allegations with "sufficient information to provide fair notice of the claim to the opposing party." *See Weston v. Pennsylvania*, 251 F.3d 420, 428 (3d Cir. 2001).[8]

R. Civ. P. 56(e); *Gans v. Mundy*, 762 F.2d 338, 341 (3d Cir. 1985).

[7] This discussion applies equally to plaintiffs' federal family association claims premised on 42 U.S.C. § 1983, and state family association claims premised on the New Jersey constitution.

[8] Plaintiffs may also replead their section 1983 supervisory liability claim against defendant Blitz (Count 15) to the extent that it relates to the familial association claims.

Federal courts have a very lenient "notice pleading" standard which simply requires that the plaintiff include "a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Fed. R. Civ. P. 8(a); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U.S. 163, 168 (1993); *Conley v. Gibson,* 355 U.S. 41, 47 (1957). The plaintiff, therefore, does not have to "set forth in detail the facts upon which he bases his claim." *Id.* at 47. Still, the plaintiff must include "sufficient information to provide fair notice of the claim," something that the plaintiffs did not do here.

Prior to the Supreme Court's decision in *Leatherman,* the Third Circuit required "a higher threshold of factual specificity for civil rights complaints." *District Council 47, Am. Fed. of State, County and Municipal Employees, AFL-CIO v. Bradley,* 795 F.2d 310, 313 (3d Cir. 1986); *see also Waltz v. County of Lycoming,* 974 F.2d 387, 389 (3d Cir. 1992). With *Leatherman,* the Supreme Court made clear that the civil rights plaintiff is not subject to a heightened standard, and need only include "a short and plain statement of the claim showing that the pleader is entitled to relief." *Id.* at 168 (citing Fed. R. Civ. P. 8(a)(2)); *see Weston,* 251 F.3d at 429.

The Court finds that plaintiffs have not provided a plain statement of the claim which provides notice of their family association claims and the grounds upon which they rest. While plaintiffs clearly need not "plead law or match facts to every element of a

legal theory," or "allege all that a plaintiff must eventually prove," *id.* (quoting *Brokaw v. Mercer,* 235 F.3d 1000, 1014 (7th Cir. 2000); *Atchinson v. District of Columbia,* 73 F.3d 418, 421-22 (D.C. Cir. 1996)), they do need to alert the defendants to the basis of their claim. Their vague allegations regarding the family association claims do not provide notice of their claims, so the Court will dismiss them without prejudice to plaintiffs' right to reassert the claims with appropriate information.

The Court is not imposing a heightened pleading standard here; instead, the Court is requiring that the plaintiffs include the information in their amended pleading that is needed to give the defendants "fair notice of what the plaintiff's claim is and the grounds upon which it rests" and shows whether plaintiffs are "entitled to relief." *See* Fed. R. Civ. P. 8(a)(2); *Conley,* 355 U.S. at 47. The Court notes that the plaintiffs have filed a lengthy, and generally factually-detailed, thirty-seven count Complaint. The Complaint though, upon close examination, provides little to no illumination of the family association claims. Instead, they have alleged, in general terms, that the defendants, as a whole, violated the familial association rights of plaintiffs James, xxx, and xxx. Plaintiffs have not alleged whose rights were violated by which defendants through what conduct and at what time. A vague allegation that defendants Gross, Blitz, Talasnik, and DeShields separated the family

and interfered with the child custody proceeding involving xxx and xxx[9] simply does not place any defendant on notice of who did what to whom and when. The Complaint does not inform the defendants about whether the family interference claim is based solely on the child custody proceeding, or includes other underlying events; it does not state when the child custody proceeding occurred, such as whether it was before or after plaintiff was arrested; it does not explain what role each particular defendant is alleged to have played in the separation of the family unit, such as whether he acted as a representative, witness, or simple observer at the child custody proceeding, or otherwise caused their separation; it does not differentiate in any way between the alleged violations to the rights of the children versus the parent;

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[9] For example, plaintiffs have alleged that defendants Blitz and Talasnik "purposefully infus[ed] themselves into the custody proceedings initiated in Family Court, Chancery Division of the Superior Court for the purpose of inducing and/or influencing the decision to remove plaintiff's children from his custody," (Complaint ¶53), that defendants Gross, Blitz, DeShields, and Talasnik "destroyed the family integrity of plaintiff's family unit," (*id.* ¶47), that defendants Blitz, Talasnik and DeShields conspired "for purposes of influencing the proceedings adjudicating custody of plaintiff's daughters," (*id.* ¶42), that defendants DeShields, Blitz and Talasnik aided [plaintiff's in-laws] in their prosecution of alleged claims of plaintiff's dangerousness, unfitness as a parent, and purported danger toward his own daughters, for the purposes of securing judicial termination of plaintiff's parental rights," (*id.* ¶55), and that defendant Talasnik "personally attended nearly all of the hearings in the Family Court proceedings," (*id.* ¶56).

and, perhaps most importantly, it does not provide any information that sheds light on the allegation that the separation occurred "without due process of law" even though there was a child custody proceeding, (*see* Complaint ¶¶66, 81, 167, 171, 175, 179). The allegations of the Complaint focus on whether the defendants had probable cause to believe that plaintiff murdered his wife, and simply do not provide notice of the grounds for a family association claim based on an alleged denial of due process.

This information is vital to provide notice of the basis for the claim here because the plaintiffs have asserted claims against government actors based on an alleged violation of their privacy rights in familial association, a right that the Third Circuit has referred to as one which "ventur[es] into the murky area of unenumerated constitutional rights." *McCurdy v. Dodd,* 352 F.3d 820, 825 (3d Cir. 2003). While it is clear that parents have a "right of personal privacy . . . in activities relating to marriage, procreation, contraception, family relationships, and child rearing and education" because these "most intimate and personal choices" are "central to the liberty protected by the Fourteenth Amendment," *Alexander v. Whitman,* 114 F.3d 1392, 1403 (3d Cir. 1996), it is also clear that the privacy interest in familial association "is not absolute," *Croft v. Westmoreland County Children and Youth Servs.,* 103 F.3d 1123, 1125 (3d Cir. 1997). The right is "limited by the compelling governmental interest in the protection of children – particularly where the children need to be protected

from their own parents," such that the interest in an integral family unit is outweighed where the State "has some reasonable and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse." *Id.* at 1126 (citing *Lehr v. Robertson,* 463 U.S. 248, 258 (1983)). The right is also limited such that it only protects the family from "state action [that is] specifically aimed at interfering with protected aspects of the parent-child relationship." *McCurdy v. Dodd,* 352 F.3d 820, 825 (3d Cir. 2003). The parameters of the right also differs depending on whether it is the parent claiming interference with his right to the "care, custody, and control of his minor children" or the child claiming interference with his right to "be in the care and custody of his parent." *See Suboh v. District Attorney's Office of Suffolk District,* 298 F.3d 81, 91 (1st Cir. 2002). Where, as in this case, plaintiffs have alleged that defendants invaded their familial association without due process of law notwithstanding the fact that a judicial custody hearing was conducted, plaintiffs must at least alleged how they failed to receive the process that was due at the hands of these defendants.

In addition, because they have alleged this right against governmental actors, they have implicated the qualified immunity of those actors. Public officials must be provided the opportunity to assert immunity defenses at the beginning of the litigation as is intended, since their immunity is from litigation and not simply from the imposition of damages, *see*

Mitchell v. Forsyth, 472 U.S. 511, 526 (1985), and can only do so if provided sufficient notice of the grounds of the claims against them. Only then can they assert that the alleged conduct did not violate a "clearly established constitutional right[ ] of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).[10]

For these reasons, the Court finds that the plaintiffs' general allegation that their familial associational rights as parent and children were violated does not provide sufficient notice of their claim and entitlement to relief. Therefore, the Court will dismiss the claims but will do so without prejudice so that plaintiffs can have a final opportunity to sharpen their claims regarding the unconstitutional conduct of each defendant whom they claim deprived them of their right of familial association, including the underlying allegations defining the alleged deprivation of due process in the child custody proceeding, consistent with the discussion herein.[11] Plaintiffs may, within thirty days of the date of this Opinion and Order, replead the familial association claims with

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[10] Indeed, the plaintiffs should consider this issue about whether the right was "clearly established" when deciding whether to replead the familial association claims.

[11] Before renewing a claim for unconstitutional interference with familial associations in an Amended Complaint, plaintiffs should also consider that this Court has found that the prosecutor defendants reasonably had probable cause to believe that plaintiff brought about his wife's death as of April 6, 2001, *see* pp. 55-59, *infra*.

the information required by Fed. R. Civ. P. 8(a)(2), subject to the strictures of Fed. R. Civ. P. 11. The information is readily available to the plaintiffs, who have alleged that they were present at the child custody proceedings and have firsthand knowledge of the alleged familial association violation. Any Amended Complaint should be filed within thirty (30) days. Following the filing of the amended pleading, the defendants who are accused of unconstitutional deprivation of familial association without due process of law will be provided an opportunity to submit further motion practice should they in good faith believe that the amended claims should be dismissed.

B. Immunity

1. Defendants Elliot Gross, M.D. and Barbara Fenton[12]

Defendants Gross and Fenton seek dismissal of all negligence claims asserted against them, namely the negligence claim against Gross in Count 21, the negligence claim against Fenton in Count 22, and the negligent infliction of emotional distress claim against Gross in Count 33, arguing that they are immune from such claims under the New Jersey Tort Claims Act and under the doctrine of qualified immunity and because they did not owe a duty to the

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[12] Though defendants Gross and Fenton presented their arguments regarding the negligence claims separately, they have been combined here because of their similarity.

plaintiffs. The Court will consider these arguments in turn.

1. New Jersey Tort Claims Act – Gross

Gross first seeks dismissal of the negligence and negligent infliction of emotional distress claims, arguing that he has immunity from them because the New Jersey Tort Claims Act in N.J.S.A. 59:3-10 provides that a "public employee acting in the scope of his employment is not liable for an injury caused by his misrepresentation." (Gross Br. at 24.) Plaintiffs do not dispute that an incorrect autopsy finding has been considered a "misrepresentation" for which negligence liability does not attach, but assert that their claims extend to other acts "unconnected to any representations" by Dr. Gross, such as his failure to record the body temperature, failure to compile clear evidence about the time of death, and failure to review toxicology results and microscopic samples prior to issuing the autopsy report. (*See* Pl. Br. at 28, citing Compl. ¶¶24, 25, 33, 34, 37, 39, 149-50.) Defendant asserts that these allegations of negligence must be dismissed under N.J.S.A. 59:3-10 because they are "part and parcel" of the allegation that Dr. Gross misrepresented the cause of death; "[w]ithout the misdiagnosis, the other errors alleged could not have produced a homicide prosecution against Mr. Andros based upon a misrepresentation of the cause of death." (Gross Reply Br. at 12.)

In essence, therefore, defendant Gross has argued that he should be relieved of liability under N.J.S.A. 59:3-10 for making the misrepresentation and for any actions which attributed to or caused the misrepresentation. This Court finds that the statute does not stretch this far. While Dr. Gross is not liable under a negligence theory for his misdiagnosis, he may be liable, if plaintiffs submit proper proof, for his alleged negligent actions which caused the misdiagnosis.

N.J.S.A. 59:3-10 was passed to "prevent public employees from being discouraged from fully developing and disseminating information to the public for fear of being sued for misrepresentation." *Acevedo v. Essex County,* 207 N.J. Super. 579, 589 (Law Div. 1985) (citing N.J.S.A. 59:3-10 comment). Therefore, if a public employee disseminates information that he, or someone else, negligently obtained, he is not liable under N.J.S.A. 59:3-10 for the misrepresentation. The statute, though, does not provide immunity to all actions or mistakes that caused the misrepresentation; such a result would provide public employees with leave to undertake their duties in a haphazard, sloppy, or otherwise negligent manner. Instead, the statute simply immunizes the individual who makes the misrepresentation itself from exposure to liability for the false information.

Defendant Gross argues, though, that the New Jersey Superior Court's decision in *Acevedo v. Essex County*, is dispositive and requires dismissal of all negligence claims here. This Court disagrees. In *Acevedo*, the court found that the plaintiff did not state a claim for negligent infliction of emotional distress when he alleged that the Medical Examiner caused him severe distress by issuing an incorrect autopsy report. *Acevedo*, 207 N.J. Super. 579, 589 (Law Div. 1985). The Examiner in *Acevedo* had ruled that the cause of death of the plaintiff's son was pneumonitis, somehow missing the fact that there were "four bullets lodged in [the son's] head." *Id.* at 583. The correction of the autopsy required the exhumation of the son's body four months after his death, and the plaintiff argued that the sight of his "son's body with four bullets in his head after it was exhumed" caused his distress. *Id.* at 586. The court found that the plaintiff could not sustain his negligent infliction of emotional distress claim under N.J.S.A. 59:3-10 because his claim was that the Examiner misrepresented the cause of death of his son. *Id.* at 589. Because the "statute specifically immunizes a public employee acting in the scope of his employment from liability caused by his misrepresentation," he could not base his negligence claim on the misdiagnosis. *Id.*

The *Acevedo* case, unlike the present case, did not involve any claims against the Examiner for his negligence in performing the autopsy. Indeed, the sole claim in the case was that for negligent infliction of

emotional distress based on the exhumation of the plaintiff's son. As a result, *Acevedo* has limited applicability to the outcome of this matter. While it does require dismissal of the negligence and negligent infliction of emotional distress claims against Dr. Gross to the extent that they assert that he negligently misrepresented the cause of Ellen's death, it does not require dismissal of the claims to the extent that they allege that he negligently performed the duties which eventually led to his misrepresentation of the cause of death.

Therefore, this Court will only dismiss pursuant to N.J.S.A. 59:3-10 the negligence claim of Count 21, and the negligent infliction of emotional distress claim of Count 33, to the extent that they are based on Dr. Gross's misrepresentation of the cause of Ellen's death.

b. New Jersey Tort Claims Act – Fenton

Next, defendant Fenton seeks dismissal of the negligence claim against her, arguing that she has immunity pursuant to the New Jersey Tort Claims Act, N.J.S.A. 59:3-2(a) and (d), which provide:

> (a) A public employee is not liable for an injury resulting from the exercise of judgment or discretion vested in him . . .
>
> (d) A public employee is not liable for the exercise of discretion when, in the face of competing demands, he determines

> whether and how to utilize or apply existing resources, including those allocated for equipment, facilities and personnel unless a court concludes that the determination of the public employee was palpably unreasonable.

Fenton argues that this section insulates her from liability for her failure to use a thermometer to measure body temperature because it was a discretionary decision. It does not.

N.J.S.A. 59:3-2(a) and (d) do not provide defendant Fenton with immunity here because the New Jersey Supreme Court has limited the statute's grant of immunity to "discretion exercised at the highest levels of government in matters of policy or planning," *Tice v. Cramer*, 133 N.J. 347, 367 (1993), of which this clearly was not. Ms. Fenton's conduct, while involving a decision regarding her use of a thermometer in the investigation, is considered a "ministerial function" under the Act for which a "public employee" is not "exonerate[d] for negligence arising out of his acts or omissions in carrying out his ministerial functions." N.J.S.A. 59:3-2. Ministerial acts are those "which public officials are required to perform upon a given state of facts in a prescribed manner, in obedience to the mandate of legal authority and without regard to their own judgment or opinion concerning the propriety or impropriety of the act to be performed." *Ritter v. Castellini*, 173 N.J. Super. 509, 514 (Law Div. 1980). Even if the actor has a "certain amount of discretion in determining exactly

how to perform this function," the function is still considered ministerial if "[n]o high-level policy decisions are involved." *Id.* (citing *Fitzgerald v. Palmer*, 47 N.J. 106, 109 (1966)).

Here, Ms. Fenton's function in investigating the death was ministerial; she, as an employee of the Medical Examiner, was required to investigate the cause of death by surveying the site and aiding the Medical Examiner in his autopsy pursuant to the procedure outlined in the New Jersey Administrative Code. Defendant Fenton's role in the investigation thus does not fall within the type of "discretionary function" covered by N.J.S.A. 59:3-2 and the Court will not dismiss the negligence claim against her on this basis.

c. Qualified immunity

Next, defendants Gross and Fenton argue that the negligence claims must be dismissed because they enjoy qualified immunity for actions taken pursuant to their official duties. Plaintiffs, though, argue that qualified immunity does not apply here because federal law qualified immunity does not immunize the state law negligence claims, and because state law qualified immunity does does not provide a ground for dismissal on this motion to dismiss because it requires a finding that the defendants acted

"in good faith," *see* N.J.S.A. 59:3-3,[13] a factual issue that cannot be determined on a motion to dismiss.

Plaintiffs are correct that this Court cannot presently dismiss the state law claims against defendants Gross and Fenton based on qualified immunity. First, federal qualified immunity cannot be invoked against the state negligence causes of action because qualified immunity is considered a substantive issue under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), meaning that state law, and not federal law, applies to issues of qualified immunity relating to state law claims asserted in federal court, *see Brown v. Grabowski*, 922 F.2d 1097, 1106-07 (3d Cir. 1990). Second, state law qualified immunity pursuant to N.J.S.A. 59:3-3 requires a factual determination regarding the "good faith" of the defendants, which is impossible to determine at this juncture. Plaintiffs have alleged that defendant Gross acted in bad faith by:

> strategiz[ing] with defendants DeShields, Talasnik and Blitz during and following the conduct of his aforenoted examinations, so as to intentionally cause a combination of and/or set into motion the creation of purported medical and other objective facts consistent with a homicidal act . . . all for the purpose of establishing alleged probable

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[13] N.J.S.A. 59:3-3 provides:

> A public employee is not liable if he acts in good faith in the execution or enforcement of any law.

> cause for the charge of murder against plaintiff.

(Compl. ¶31.) Though more attenuated, plaintiffs' complaint can be read to allege that defendant Fenton, as an employee of the Medical Examiner, also acted in bad faith as it asserts that:

> employees of the . . . County Medical Examiner specifically discussed the issue of time of death by telephone and in person and, knowing and/or with reckless disregard to the fact that the evidence then available conclusively demonstrated that plaintiff Andros could not in any way have caused Ellen Andros' death, said defendants conspired to: 1) concoct a motive for plaintiff to have killed his wife and ignore or conceal the medical, physical, and testimonial evidence to the contrary, 2) distort, alter or misrepresent that medical, physical and testimonial evidence, and/or 3) maintain or bolster the obvious false conclusion of defendant Gross that Ellen Andros died as the result of a homicidal act.

(Compl. ¶32.) Therefore, accepting the allegations in the Complaint as true for purposes of this motion to dismiss, the Court cannot dismiss the negligence claims based on qualified immunity.

d. Duty to plaintiffs

Finally, defendants Gross and Fenton seek dismissal of the negligence claims, arguing that plaintiff

cannot state a valid claim for relief because the defendants did not owe a duty to the plaintiffs.

In order to establish a claim for negligence and for negligent infliction of emotional distress, a plaintiff must show that the defendant owed a duty to the plaintiff, that the defendant breached that duty, and that the breach of the duty caused damages to the plaintiff.[14] *Lacy v. Cooper Hospital*, 745 F. Supp. 1029, 1035 (D.N.J. 1990); *Williamson v. Waldman*, 150 N.J. 232, 239 (1997). Here, defendants argue that they did not owe a duty to plaintiffs, but instead owed it to the public at large, so that these individual plaintiffs cannot establish a claim for negligence.

Defendants Gross and Fenton do not dispute that the New Jersey State Medical Examiner Act imposed upon them the duty to investigate, record, and report the cause of Ellen's death. *See* N.J.S.A. 52:17B-78, *et seq.*; N.J.A.C. 13:49-5.1. They assert, though, that plaintiffs cannot base their negligence claims on the duties imposed by the Act because the duties run to the public at large, and not to these specific plaintiffs. According to defendants, "the remedy for a medical

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[14] In order to establish a claim for negligent infliction of emotional distress, the plaintiff must also show that (1) the defendant's negligence caused the death or serious physical injury of another, (2) the plaintiff and the injured person share an intimate or familial relationship, (3) the plaintiff observed the death or injury at the scene of the accident, and (4) the plaintiff suffered severe emotional distress as a result. *Portee v. Jaffee*, 84 N.J. 88, 98-100 (1980).

examiner's negligent performance is not a private right of action in damages, but in discipline by the office of the State Medical Examiner [which] has, in fact, acted in this case." (Def. Gross Reply Br. at 10 (citing N.J.S.A. 32:17B-80)).[15]

This Court finds that plaintiffs may continue their case based on the statutory duties imposed upon the defendants. The defendants are correct that no New Jersey case has specifically held that the State Medical Examiner Act imposes a duty on a Medical Examiner that runs to individual members of the public. However, New Jersey courts have inferred that members of the public may assert such a duty.

Under New Jersey law, where a statute does not explicitly confer a private right of action for persons who may be harmed by violations of it, the determination of whether it implicitly provides a private cause of action is determined by considering:

> [w]hether the plaintiff is "one of the class for whose special benefit the statute was enacted;" whether there is any evidence that the Legislature intended to create a private cause of action under the statute; and

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[15] N.J.S.A. 52:17B-80 provides:

> The State Medical Examiner shall have general supervision over the administration of and shall enforce the provisions of this act. He shall have general supervision over all county medical examiners. He shall promulgate such rules and regulations as he may deem necessary to effectuate the provisions of this act.

> whether implication of a private cause of action in this case would be "consistent with the underlying purposes of the legislative scheme."

In re State Comm'n of Investigation, 108 N.J. 35, 41 (1987) (adopting standard established in *Cort v. Ash*, 422 U.S. 66 (1975)).[16]

Defendants argue that the State Medical Examiner Act was passed for the purpose of protecting the general public by determining the causes of suspicious deaths. The Act itself, though, includes protections and imposes duties on the "closest surviving relative of the decedent" as well. First, the Act requires that the relative notify the Medical Examiner of any death that was "by criminal violence or by accident or suicide or in any suspicious or unusual manner." N.J.S.A. 52:17B-89. Failure to do so is punishable as a disorderly persons offense. *Id.* Second, the Act provides the relative the right to object to a autopsy on religious grounds and, if he does,

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[16] Defendants have cited a case applying Missouri law for the proposition that "[w]hen a defendant performs an act under a statute creating a public duty, that defendant's duty is to the public and not to any individual." *Lawyer v. Kernodle*, 721 F.2d 632, 634 (8th Cir. 1983). However, the case continues by explaining that the "exception, of course, is when the statute also was intended to create a private cause of action." *Id.* The *Lawyer* court found that the Missouri statute did not provide a private cause of action to the relative of the decedent. *Id.* This finding, of course, is not binding on this Court's determination of whether the New Jersey statute does.

requires the medical examiner to wait 48-hours prior to conducting the autopsy so the relative has a chance to institute a court action to determine the appropriateness of the autopsy. N.J.S.A. 52:17B-88.2-88.5. Third, the Act was amended in 1989 to provide additional protections to relatives of the decedent; it now requires that the county medical examiner make available a copy of his findings and conclusions to the closest surviving relative. *See* N.J.S.A. 59:17B-88, Health and Welfare Committee Statement No. 988-L.1989, c. 323.

Therefore, this Court finds that the State Medical Examiners Act is intended to protect not just the general public, but also the relatives of the decedent. This Act implicates duties owed by the Medical Examiner to the decedent's closest relatives. As a result, the Court finds that the plaintiffs may, in this case, assert the duties imposed upon the Medical Examiner in the State Medical Examiners Act.

The Court's conclusion is bolstered by the New Jersey Supreme Court's decision in *Maslonka v. Hermann*, an action which was brought by the husband of a decedent who alleged that his wife's death was caused by the failure of doctor defendants to provide appropriate post-partum care. *Maslonka*, 85 N.J. 533, 534 (1981). The doctors argued that they believed the cause of death was not due to their care, and that the plaintiff could not prove otherwise because there was no autopsy performed. *Maslonka v. Hermann*, 173 N.J. Super. 566, 587 (App. Div. 1980) (Milmed, J., dissenting), dissenting op. aff'd, 85 N.J.

533 (1981). The court, though, explained that the doctors had a statutory duty under the State Medical Examiners Act to notify the Medical Examiner, and because they "failed to comply with the terms of the statute in a most important respect, viz., notification," they could not "be given the protection they seek in their claim that the final death-determining factor is missing." *Id.* The court explained its assumption that "had the county prosecutor been properly notified, he at least would have seen to it that there was full compliance with the pertinent provisions of the State Medical Examiner Act." *Id.* As a result, the court allowed the plaintiff's claim to proceed in spite of the absence of autopsy evidence. *Id.* In this way, the Supreme Court of New Jersey held the doctors responsible to the private plaintiffs for the duties imposed by the State Medical Examiner Act. The defendants in the present case have not indicated why the Supreme Court of New Jersey would not likewise hold the Medical Examiner responsible to private plaintiffs for duties imposed by the Act.

The Court has considered whether allowing plaintiffs to assert a private cause of action under the State Medical Examiners Act against Medical Examiners will cause Examiners to be subject to extensive litigation, and finds that it will not. The State Medical Examiners Act must be read in conjunction with the provisions of the New Jersey Tort Claims Act which relieves a Medical Examiner from liability provided "he acts in good faith in the execution or enforcement of any law." N.J.S.A. 59:3-3. In this case,

as explained *supra*, section III.B.1.c, plaintiffs have alleged that defendants Gross and Fenton did not "act in good faith" in executing their duties under the State Medical Examiner Act, and therefore, they have sustained their burden on this motion to dismiss.

As a result, this Court will not dismiss the negligence claims against defendants Gross and Fenton which are asserted in Counts 21, 22, and 33 of plaintiffs' Complaint because factual issues remain regarding their disposition.

2. Defendant Hydow Park, M.D.

Defendant Park seeks dismissal of the section 1983 claim asserted against him in Count 14 which alleges that he recklessly and deliberately supervised Dr. Gross as he engaged in unconstitutional conduct, and that he participated in, and allowed the continuation of, a policy and custom in Atlantic County which allowed individuals like Dr. Gross to serve as Medical Examiner. Defendant Park argues that this claim must be dismissed because he enjoys qualified immunity and because he cannot be held responsible for the actions of Dr. Gross under a theory of respondeat superior.

a. Qualified immunity

Government officials who perform discretionary functions are entitled to qualified immunity from suits brought against them for damages under section

1983 "insofar as their conduct does not violate clearly established constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Sharrar v. Felsing*, 128 F.3d 810, 826 (3d Cir. 1997). The plaintiff bears the initial burden of showing that the defendant's conduct violated a clearly established statutory or constitutional right, *Sherwood v. Mulvihill*, 113 F.3d 396, 399 (3d Cir. 1997); then the defendant bears the burden of proving that "a reasonable public official would not know that [the] specific conduct violated clearly established rights," *id.*; *Grant v. City of Pittsburgh*, 98 F.3d 116, 121 (3d Cir. 1996) (citing *Anderson v. Creighton*, 483 U.S. 635, 636-37 (1987)).

The Court must begin any qualified immunity analysis with "the predicate question of whether plaintiff's allegations are sufficient to establish a violation of a constitutional right at all." *Sherwood*, 113 F.3d at 399 (internal citations omitted). Here, defendant Park asserts that he enjoys qualified immunity because plaintiffs have not alleged that he knew or should have known that the conduct of Dr. Gross, or the County, was unconstitutional. In support, defendant Park cites *Lawyer v. Kernodle* in which the Ninth Circuit explained that it "has generally been held that coroners enjoy a qualified immunity when performing their official functions for the state." 721 F.2d 632, 636 (9th Cir. 1983) (citing *Willett v. Wells*, 469 F. Supp. 748, 752-53 (E.D. Tenn. 1977); *Hebert v. Morley*, 273 F. Supp. 800, 802 (C.D. Cal. 1967)). The *Lawyer* court found that, because the

husband of the decedent "did not allege that these defendants acted outside the permissible scope of their statutory discretion," there was no liability under the civil rights law because the coroner could not have violated clearly established constitutional rights by acting in accordance with his statutory duties. *Id.* at 635-36.

Here, though, plaintiffs have alleged that Dr. Park acted beyond his statutory authority by unconstitutionally creating a case against plaintiff. Plaintiffs allege that Dr. Park "brainstorm[ed]" with Dr. Gross, at the direction of defendant Blitz and Talasnik, to decide how to "reaffirm and maintain [the] conclusion that Ellen Andros died as the result of a homicidal act, and thereby bolster defendant Blitz's unfounded proposition that plaintiff had murdered his wife," so that plaintiff could be arrested and prosecuted without probable cause in violation of the Constitution, and that Dr. Park then participated in, and failed to remedy, the conduct which led to plaintiff's unconstitutional arrest and prosecution. (Compl. ¶¶42, 119-24.) Such allegations are sufficient to withstand this motion to dismiss. Though defendant Park argues that the allegations are "merely hopeful speculations" that are not supported by fact, (Def. Park Reply Br. at 1), the Court must accept them as true for purposes of this motion. Whether plaintiff's allegations against Dr. Park can survive a properly-supported summary judgment motion in the future remains to be seen. Therefore, the Court will

not dismiss the claim against Dr. Park on immunity grounds at this stage.

b. Respondeat superior/supervisory liability

Defendant Park argues that the Court must still dismiss the section 1983 claim asserted against him because he cannot be held liable for Dr. Gross' conduct on a respondeat superior theory under section 1983. (Def. Park Br. at 9.) Plaintiffs do not dispute that section 1983 liability cannot be predicated on the theory of respondeat superior, but assert that they seek to hold Dr. Park liable based on a theory of supervisory liability, not respondeat superior.

A defendant in a section 1983 action "must have personal involvement in the alleged wrongs." *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988). To hold a supervisor liable for another's actions, therefore, the plaintiffs must prove that the supervisor personally "participated in violating [their] rights, . . . that [he] directed others to violate them, or that [he] . . . had knowledge of and acquiesced in [his] subordinates' violations." *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1293 (3d Cir. 1997) (quoting *Baker v. Monroe Twp.*, 50 F.3d 1186, 1190-91 (3d Cir. 1995); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1478 (3d Cir. 1990)). A supervisor's "actual knowledge and acquiescence" is enough to establish supervisory liability because it can be equated with "personal

direction" from the supervisor. *Robinson*, 120 F.3d at 1294. The Third Circuit explained:

> Where a supervisor with authority over a subordinate knows that the subordinate is violating someone's rights but fails to act to stop the subordinate from doing so, the fact-finder may usually infer that the supervisor "acquiesced" in (i.e., tacitly assented to or accepted) the subordinate's conduct. But where actual supervisory authority is lacking, mere inaction, in most circumstances, does not reasonably give rise to a similar inference. As a general matter, a person who fails to act to correct the conduct of someone over whom he or she has no supervisory authority cannot fairly be said to have "acquiesced" in the latter's conduct.

Id. Therefore, except "in unusual circumstances, a government official or employee who lacks supervisory authority over the person who commits a constitutional tort cannot be held, based on mere inaction, to have "acquiesced" in the unconstitutional conduct." *Id.*

Here, plaintiffs have alleged that Dr. Park had actual knowledge Dr. Gross' conduct and acquiesced in it, and should therefore be liable as a supervisor. It clearly is disputed whether Dr. Park had such knowledge and acquiescence, but it cannot be disputed that plaintiffs have pled that he did. In their Complaint, plaintiffs allege that Dr. Park knew that it was "impossible" for plaintiff to have murdered his wife, and yet "brainstormed" with Dr. Gross, and at

the direction of defendants Blitz and Talasnik, about ways to "re-affirm and maintain [the] conclusion that Ellen Andros died as the result of a homicidal act, and . . . that plaintiff had murdered" her. (Comp. ¶¶42, 119-24.) Plaintiffs further allege that Dr. Park then "condoned and/or knowingly acquiesced" in defendant Gross' alleged efforts to fabricate, conceal, or manufacture evidence that would support the wrongful charge. (Compl. ¶¶31, 42, 44, 123.) The Court, therefore, will not dismiss the section 1983 claim against defendant Park; for purposes of this motion to dismiss, accepting these allegations that Dr. Park knowingly approved Dr. Gross's alleged unconstitutional conduct as true, they state a claim for section 1983 supervisory liability. This finding, of course, is without prejudice to Dr. Park's right to move for summary judgment in the future.

3. Defendants Bruce DeShields, Eladio Ortiz, Jeffrey Blitz, and Murray Talasnik

The defendant investigators and prosecutors, namely Sergeant Bruce DeShields, Lieutenant Eladio Ortiz, Atlantic County Prosecutor Jeffrey Blitz, and Atlantic County First Assistant Prosecutor Murray Talasnik, seek summary judgment as to all claims asserted against them, arguing that they enjoy absolute immunity, or at the least, qualified immunity, from suit. Plaintiffs, in asserting that the defendants do not enjoy immunity from their claims, argue that the federal immunity law invoked by defendants does

not extend to the state law claims. This Court agrees and, while finding that the federal claims must be dismissed on immunity grounds, with the exception of the federal familial interference claims which the Court is dismissing on vagueness grounds,[17] finds that the Court cannot presently dismiss the state claims based on the defendants' papers. The Court, though, will allow the defendants to raise claims of immunity regarding the state claims and the federal familial interference claims, if replead, in a forthcoming motion, should they desire to do so and should they possess a good faith belief that such immunity applies.

a. Federal law claims

(1) Probable cause determination

Essential to plaintiffs' argument that defendants DeShields, Ortiz, Blitz, and Talasnik do not have immunity from the federal claims is their assertion that the defendants never had probable cause to prosecute plaintiff for the murder of his wife because there was "clearly exculpatory evidence" which, according to plaintiff, proved that he was at the Beach Bar & Grill at the time of his wife's death. The Court, therefore, will first consider when, if ever, the defendants had probable cause to believe that plaintiff caused the death of his wife.

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[17] *See* section III.A, *supra*.

Defendants have argued that they had probable cause on March 31, 2001, the day of Ellen's death, because they saw that plaintiff was intoxicated, saw his mother-in-law ask if he "killed her," and saw that the house did not show signs of breaking in. Plaintiff, on the other hand, has argued that the defendants never had probable cause, because there was "clearly exculpatory evidence" that he was at the Beach Bar & Grill at the time Ellen died. The Court finds that, viewing the evidence in the light most favorable to the plaintiff, the defendants had probable cause to suspect plaintiff of the crime on April 6, 2001.

Probable cause to arrest exists when the facts and circumstances are such that "a reasonable person [would] believe that an offense has been . . . committed by the person to be arrested." *Orsatti v. New Jersey State Police*, 71 F.3d 480, 483 (3d Cir. 1995). Here, Dr. Gross issued his conclusion that Ellen had died as a result of homicide on March 31, 2001, the date of her death. The prosecutors, though they may have immediately suspected plaintiff, did not have clear evidence that he committed the murder. They were faced with contradictory evidence, namely his story, which he consistently maintained, that he was at the Beach Bar & Grill throughout the night and did not know his wife was home, and his mother-in-law's initial reaction that he could have killed Ellen. Prosecutors surely had reason to continue their investigation into plaintiff's relationship with his wife, but they did not necessarily have probable cause

to believe that he murdered his wife in the days immediately following her death.

By April 6, 2001, though, the landscape had changed and the defendants had probable cause to believe that plaintiff was guilty of the crime. By then, they had discovered that plaintiff's alibi was not tight. Though there was evidence that Ellen died between 2:00 and 2:30 a.m. and plaintiff claimed he was at the Beach Bar & Grill from 9:00 p.m. until 4:00 a.m., no witness could testify that he was there the entire period. Instead, the witnesses provided a wide range of arrival and departure times, with plaintiff arriving somewhere between 11:00 p.m. and 1:00 a.m. and leaving between 3:30 a.m. and 4:00 a.m. (*See* Kent Cert., Exs. 3-5, 26-28.) Also by April 6, 2001, the prosecutors had Dr. Gross' supplemental report which again concluded that Ellen was a victim of homicide. They had also learned by April 6th that plaintiff was estranged from his wife and had threatened to hurt her on several previous occasions. On April 6, 2003, Calvin Gadd verified reports by Sharon Hogan, Julie Goldberg, and Viola McElroy that Ellen wanted to leave plaintiff but was frightened of him because he had threatened to kill her with his gun and with his car, and because he was especially violent when intoxicated. (Clarke Cert., Ex. B.) That Ellen was found dead after her husband returned from a night of drinking, given his past threats toward her and his history of violence when intoxicated, strongly heightened these defendants' suspicions. The supplemental report, coupled with the

other witness statements and evidence obtained between March 31 and April 6, 2001, provided probable cause to suspect plaintiff of the murder.

Of course, the unfortunate reality of this case is that the charges were unfounded; plaintiff did not murder his wife. However, the standard for probable cause is whether "a reasonable person [would] believe that an offense has been . . . committed by the person to be arrested," and by April 6, 2001, a reasonable person would believe that plaintiff was responsible for his wife's death.

The Court has considered the evidence which existed on April 6, 2001 which was exculpatory toward plaintiff, but finds that it did not eliminate the probable cause that existed. First, as noted above, the Beach Bar & Grill alibi was not tight, the alibi witnesses were of questionable reliability such as Mr. Andros' father who was highly intoxicated, and investigators reasonably concluded that even if Ellen was murdered at 2:00 a.m., plaintiff could have been responsible. Second, while Ellen's body showed no signs of struggle which could indicate that she may have died of natural causes, it could also indicate that she did not struggle because she knew her attacker. Third, while Dr. Gross' finding of asphyxiation by suffocation was not entirely consistent with his finding of pre-mortem petechiae, it was consistent with a finding of asphyxiation and, according to Dr. Jason, was the "most likely" explanation for her death prior to viewing the slides which confirmed the alternate basis. (*See* Clarke Cert., Ex. H at 7.) These

defendants, being law enforcement personnel and not trained in pathology, could reasonably rely upon the medical conclusions of Dr. Gross as of April 6th. The so-called "clearly exculpatory evidence," therefore, was not "clearly exculpatory" at the time, even though it would eventually prove true. The defendants had probable cause on April 6, 2001 to believe plaintiff had murdered his wife.

(2) Absolute immunity

Defendants Blitz, Talasnik, Ortiz and DeShields argue that they enjoy absolute prosecutorial immunity from the federal claims because they relate to actions taken as prosecutors. Plaintiffs, though, argue that defendants do not enjoy such immunity because they were acting as investigators, and not prosecutors, when taking the actions which are at issue in this case.

It is clear that "acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity." *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993). However, it is also clear that the court "must begin with the presumption that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties," and thus must be "quite sparing" in finding that absolute prosecutorial immunity applies. *Carter v. City of Philadelphia*, 181 F.3d

339, 355 (3d Cir. 1999) (quoting *Burns v. Reed*, 500 U.S. 478, 486-87 (1991)).

The official seeking absolute immunity bears the burden of showing that he was acting in a prosecutorial function during the conduct at issue. *Carter*, 181 F.3d at 355. If he was acting in an "investigative or administrative capacity," rather than a "quasi-judicial" capacity, he may only be protected by qualified immunity, and not absolute immunity. *Id.* If the function of the prosecutor is the same as that of a detective or investigator, "the immunity that protects them is also the same," namely qualified immunity. *Buckley*, 509 U.S. at 275.

The "distinction between actions taken in a quasi-judicial role and those taken in an investigative role often involves a 'gray area.'" *Rose v. Bartle*, 871 F.2d 331, 345 (3d Cir. 1989). Whether the official enjoys absolute immunity for the conduct depends on "the nature of the function performed, not the identity of the actor who performed it." *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997). The court must "engage in a functional analysis of each alleged activity" to determine whether there is a "'functional tie' between that conduct and the judicial process." *Buckley*, 509 U.S. at 277-78; *Ernst v. Child and Youth Servs. of Chester County*, 108 F.3d 486, 495 (3d Cir. 1997); *Giuffre v. Bissell*, 31 F.3d 1241, 1251 (3d Cir. 1994).[18]

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[18] The need for a functional analysis is another reason why the Court is requiring plaintiffs to replead their claims

(Continued on following page)

Quasi-judicial functions, for which absolute immunity is available, are those which "fall within a prosecutor's role as advocate for the State" and are "intimately associated with the judicial phases of litigation." *Carter*, 181 F.3d at 356 (citing *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976); *Giuffre v. Bissell*, 31 F.3d 1241, 1251 (3d Cir. 1994)). They include deciding whether to seek an indictment based on the evidence gathered by law enforcement, *Buckley*, 509 U.S. at 278, deciding whether to prosecute a case to trial or accept a guilty plea, *Davis*, 996 F.2d at 629, appearing in court to apply for a search warrant, *Burns*, 500 U.S. at 492, filing charging documents even if charges are politically motivated or filed in bad faith, *Kalina*, 522 U.S. at 129; *Kulwicki v. Dawson*, 969 F.2d 1454 (3d Cir. 1992), preparing for grand jury or trial proceedings, *Imbler*, 404 U.S. at 430, presenting evidence at a court hearing or at trial, even if the evidence is false, *Burns*, 500 U.S. at 487; *Imbler*, 424 U.S. at 431, and preparing witnesses to give testimony, even if the testimony solicited is false, *Buckley*, 509 U.S. at 273; *Burns*, 500 U.S. at 487, 492.

Investigative functions, on the other hand, for which absolute immunity does not apply, include "searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested," *Buckley*, 509 U.S. at 274, preliminarily

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regarding deprivation of familial association. Plaintiffs must be more precise in alleging what each defendant did to deprive plaintiffs of these rights regarding child custody.

gathering evidence that "may ripen into a prosecution," *id.* at 273, conducting interviews to establish whether or not probable cause exists, *Michaels v. New Jersey*, 50 F. Supp. 2d 353, 360 (D.N.J. 1999), providing legal advice to police during pretrial investigation, *Burns*, 500 U.S. at 492-96, holding press conferences, *Buckley*, 509 U.S. at 276-78, and fabricating evidence concerning an unsolved crime, *id.* at 273-74. Indeed, actions taken by the prosecutor before he has "probable cause to have anyone arrested" are "entirely investigative in character," and cannot be "shield[ed]" later as prosecutorial because "they may be retrospectively described as 'preparation' for a possible trial." *Id.* at 275.

This Court finds that defendants Jeffrey Blitz and Murray Talasnik, prosecutors for Atlantic County, are entitled to absolute immunity for many, but not all, claims asserted here. Defendants Bruce DeShields and Eladio Ortiz, investigators for the prosecutor's office, on the other hand, are not entitled to absolute immunity as their actions were investigative in nature.

First, defendants DeShields and Ortiz do not enjoy absolute immunity from the federal claims asserted here because the claims are premised on actions they took in an investigative function. The only federal count asserted against defendant Ortiz is the warrantless search claim in Count 17, which is clearly based on Lieutenant Ortiz's search for incriminating evidence. Four federal claims remain against defendant DeShields after this Court's familial interference

decision, *see* section III.A, *supra*, namely section 1983 claims for malicious prosecution, defamation, conspiracy, and warrantless search, (Compl., Counts 1, 3-5, 17), and the record shows that DeShield's conduct underlying these claims was investigative in nature. He was the investigator who arrived on the scene on the morning of Ellen's death, interviewed witnesses, and executed a search warrant on plaintiff's house, all investigative functions. (Kent Cert., Exs. 1, 6, 14, 18; Clarke Cert., Ex. B.) Therefore, this Court will not dismiss these federal claims asserted against DeShields and Ortiz on the basis of absolute prosecutorial immunity.

Defendants Blitz and Talasnik, on the other hand, are entitled to absolute immunity for some, but not all, of the federal claims in this case. There are five federal claims which remain against Blitz and Talasnik after this Court's family interference decision, namely the section 1983 claims for malicious prosecution, defamation, conspiracy, supervisory liability, and abuse of process. (Compl. Counts 1, 3, 5, 15, 25.) The Court will dismiss the malicious prosecution and abuse of process claims based on prosecutorial immunity because they are based solely on actions taken in a prosecutorial function, will not dismiss the defamation claim based on prosecutorial immunity because it did not involve any prosecutorial function, and will only dismiss in part the conspiracy and supervisory liability claims based on prosecutorial immunity as they involve both investigatory and prosecutorial functions. In the end, though, all federal

claims which have been asserted against Blitz and Talasnik, DeShields and Ortiz, *will* be dismissed, as the claims which remain after the Court's prosecutorial immunity decision fall within the doctrine of qualified immunity, as explained *infra*.

The malicious prosecution[19] and abuse of process[20] claims are based on actions that Blitz and Talasnik took in their prosecutorial function. They are based on plaintiff's allegation that defendants Blitz and Talasnik initiated the prosecution against him for murder due to malicious, arbitrary, unreasonable, and political reasons. This decision to prosecute, though, was an action "at the heart of the prosecutorial decisionmaking process." *Davis v. Grusemeyer*, 996 F.2d 617, 629 (3d Cir. 1993). In *Imbler*, the Supreme Court expressly "held that prosecutors sued for malicious prosecution under section 1983 enjoy absolute immunity for their conduct in initiating a prosecution and in presenting the State's case,

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[19] To prove malicious prosecution under section 1983, a plaintiff must show that: (1) the defendants initiated a criminal proceeding; (2) the criminal proceeding ended in plaintiff's favor; (3) the proceeding was initiated without probable cause; (4) the defendants acted maliciously or for a purpose other than bringing the plaintiff to justice; and (5) the plaintiff suffered deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding. *Estate of Smith v. Marasco*, 318 F.3d 497, 521 (3d Cir. 2003).

[20] To prove abuse of process under section 1983, a plaintiff must show that the defendant initiated a prosecution legitimately, but thereafter used it for a purpose other than that intended by law. *Rose v. Bartle*, 871 F.2d 331, 350 (3d Cir. 1989).

because those activities are intimately associated with the judicial phase of the criminal process." *See Davis*, 996 F.2d at 628 (quoting *Imbler*, 424 at 431). The prosecutor's decision to institute charges, and to continue to prosecute them to trial "is absolutely immune . . . even where he acts without a good faith belief that any wrongdoing has occurred" because "[h]arm to a falsely-charged defendant is [to be] remedied by safeguards built into the judicial system – probable cause hearings, dismissal of the charges – and into the state codes of professional responsibility," not by civil actions by the accused against the prosecutor. *Kulwicki*, 969 F.2d at 1464. Therefore, plaintiff's claims that Blitz and Talasnik filed and pursued murder charges for improper motives are covered by absolute immunity.[21] The Court, therefore, will grant the motion of Blitz and Talasnik for summary judgment as to the claims in Counts 1 and 25.

The defamation claim of Count 3, on the other hand, is not covered by absolute immunity. With this

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[21] While plaintiff has argued that the claims cannot be considered prosecutorial and subject to absolute immunity because the prosecutors never had probable cause to arrest him and the *Buckley* Court held that actions taken before the prosecutor has "probable cause to have anyone arrested" are "entirely investigative in character," 509 U.S. at 275, this Court has found that, viewing the evidence in the light most favorable to plaintiff, the prosecutors had probable cause to arrest plaintiff by April 6, 2001. The institution of criminal proceedings, which is the subject of the malicious prosecution and abuse of process claims, did not occur until later, as the case was not presented to the grand jury until June 5, 2001.

claim, plaintiff has alleged that defendants Blitz and Talasnik "defam[ed] him through knowingly, willingly, and recklessly making false defamatory statements of fact about plaintiff Andros through various news mediums," such as that he "murdered his wife by asphyxiation from suffocation and that he physically and mentally abused and mistreated his wife." (Compl. ¶69.) If true, defendants cannot claim absolute immunity for these allegations. The Supreme Court in *Buckley* made clear that "out-of-court statements to the press" have "no functional tie to the judicial process just because they are made by a prosecutor." 509 U.S. at 277-78. Therefore, this Court will not dismiss the defamation claim on absolute immunity grounds, and will consider *infra* whether it is protected by qualified immunity.

Finally, the conspiracy and supervisory liability claims of Counts 5 and 15, will be dismissed in part to the extent that they seek relief for prosecutorial functions. In other words, the Court will not dismiss the claims at this juncture based on absolute immunity to the extent that they seek relief for Blitz's supervision of investigators DeShields and Ortiz, *see Burns*, 500 U.S. at 492-96, for their provision of legal advice to law enforcement pretrial investigations, *Buckley*, 509 U.S. at 276-78, and for actions taken prior to April 6, 2001, the latest date that they obtained probable cause as explained *supra*, including their preliminary gathering of evidence during that period and allegations that they fabricated evidence during that period, *Buckley*, 509 U.S. at 273-74. In

the end, though, these claims will be dismissed under the doctrine of qualified immunity, as explained next.

(3) Qualified immunity

Remaining as federal claims after this Court's absolute immunity decision are three counts against defendant Blitz (Count 3: defamation, Count 5: conspiracy, and Count 15: supervisory liability), two counts against defendant Talasnik (Count 3: defamation, Count 5: conspiracy), one count against defendant Ortiz (Count 17: warrantless search), and four counts against defendant DeShields (Count 1: malicious prosecution, Count 3: defamation, Count 5: conspiracy, and Count 17: warrantless search). The Court will next consider whether these claims are shielded by the doctrine of qualified immunity.

The doctrine of qualified immunity was explained *supra*, section III.B.2.a. The doctrine protects government officials who perform discretionary functions from section 1983 actions "insofar as their conduct does not violate clearly established constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The plaintiff bears the initial burden of showing that the defendant's conduct violated a clearly established statutory or constitutional right, *Sherwood v. Mulvihill*, 113 F.3d 396, 399 (3d Cir. 1997), then the defendant bears the burden of proving that "a reasonable public official would not know that [the] specific conduct violated clearly established rights,"

id.; *Grant v. City of Pittsburgh*, 98 F.3d 116, 121 (3d Cir. 1996).

The Court must begin its qualified immunity analysis with "the predicate question of whether plaintiff's allegations are sufficient to establish a violation of a constitutional right at all." *Sherwood*, 113 F.3d at 399. In a summary judgment motion, such as this one, the plaintiff must come forward with facts or allegations to show both that defendant's alleged conduct violated law and that law was clearly established when violation occurred in order to prevail against the defendant's qualified immunity defense. *Pallottino v. City of Rio Rancho*, 31 F.3d 1023, 1026 (10th Cir. 1994). Plaintiff has not done so here.

First, for the defamation claim asserted against defendants Blitz, Talasnik, and DeShields, plaintiff asserts that defendants violated his Fourteenth Amendment "liberty interest in his good name, reputation, honor, and integrity" by "making false defamatory statements of fact" about him "through various news medium." (Compl. ¶¶69-70.) However, the Third Circuit has established that this does not establish a constitutional violation. In *Boyanowski v. Capital Area Intermediate Unit*, the Third Circuit held that a plaintiff's interest in his reputation is not "liberty" or "property" for purposes of Due Process Clause protection. *Boyanowski*, 215 F.3d 396, 401 (3d Cir. 2000). In so doing, the Third Circuit explained the Supreme Court precedent which "has made clear that federal courts are not to view defamatory acts as

constitutional violations." *Id.* (citing *Paul v. Davis*, 424 U.S. 693 (1976)). Therefore, the Court will dismiss the section 1983 defamation claim of Count 3 because plaintiff has not established a constitutional violation based on the alleged defamation.

Second, for the conspiracy and malicious prosecution claims, plaintiff asserts that defendants violated his right to be free from arrest and from prosecution without probable cause. (Compl. ¶¶26, 64.) However, as explained *supra*, section III.B.3.a.1, defendants had probable cause to arrest plaintiff and probable cause to prosecute plaintiff on April 6, 2003 [sic]. Though plaintiff asserts that defendants fabricated evidence and ignored "clearly exculpatory" evidence, plaintiff was still not deprived of his right to be arrested and tried only upon probable cause. In the end, defendants were wrong; plaintiff had not murdered his wife. However, their error does not negate the clear reality that they had probable cause to believe that plaintiff was guilty of the crime when they arrested him and throughout the prosecution.[22]

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[22] This Court has considered the allegation that defendant DeShields lied at the Grand Jury proceeding when he testified that plaintiff's last phone call at 12:30 a.m. was about "four hours before Ellen dies," (Clarke Cert., Ex. D, Tr. at 31-32), thus implying that Ellen was alive at 4:30 a.m. when plaintiff returned home from the Beach Bar & Grill. The Court makes no finding at this juncture as to whether a claim based on this misstatement is viable under state law. However, it is clear that, even if this misstatement was made, there still was probable cause to suspect, arrest, and prosecute plaintiff for the crime. As

(Continued on following page)

Third, for the warrantless search claim, plaintiff asserts that his privacy interest was violated by two searches completed by defendants DeShields and Ortiz. He asserts that on March 31, 2001, defendants searched his and Ellen's email accounts and that on April 18, 2001, defendants imaged the computer master harddrive seized from xxx. Prior to both of the searches, on March 31, 2001, plaintiff had signed a "consent to search" form and defendants had obtained a search warrant, but plaintiff asserts that neither provided authority for these searches.

The Court finds that plaintiff has failed to establish a constitutional violation based on these searches because they were authorized by the March 31, 2001 warrant which provided authority for a search and seizure of any "computers, monitors, keyboards, mouse, printers, electronic storage media, programs and software and other similar devices, notes and letters stored on paper or electronically." (Clarke Cert., Ex. K.) While plaintiffs later sought and obtained a "communications data warrant" from Judge Garafolo on April 2, 2001, which provided authority to search "all computer records in the possession of America Online pertaining to an AOL account maintained by Ellen and James Andros," (*id.*, Ex. R), defendants still had a warrant to seize and search the

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a result, his section 1983 claims premised on this misstatement are not viable under the doctrine of qualified immunity as they do not show a clear constitutional violation.

computer records in plaintiff's possession during the March 31st and April 18th, 2001 searches.[23]

Finally, the supervisory liability claim is based on defendant Blitz's supervision of the other alleged constitutional violations. (Compl. ¶¶125-29.) Because this Court has found that plaintiff has not stated a claim for the constitutional violations, with the possible exception of the federal familial interference claims if they are replead, the Court will dismiss the supervisory liability claim. Plaintiffs may replead the supervisory liability claim in conjunction with the familial interference claims if such an allegation is warranted under Fed. R. Civ. P. 11.

For these reasons, the Court has decided that all federal claims asserted against defendants Blitz, Talasnik, DeShields and Ortiz must be dismissed on grounds of immunity.

b. State claims

Defendants Blitz, Talasnik, Ortiz and DeShields also argue that they enjoy the same absolute and qualified immunity from plaintiffs' state law claims as they enjoy from plaintiff's' federal law claims. This Court disagrees as federal immunity law does not extend to the state law claims asserted here. Instead,

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[23] For this reason, the Court will also dismiss the warrantless search claims of Counts 18 and 19, as they are based on the same two searches which were covered by the March 31, 2001 consent and warrant.

state law immunity principles apply, as matters of substantive law, to state claims brought in federal court. *See Brown v. Grabowski*, 922 F.2d 1097, 1106 (3d Cir. 1990) (citing *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)); *see also Jackson v. Georgia Dept. of Transportation*, 16 F.3d 1573, 1583 (11th Cir. 1994); *Walton v. City of Southfield*, 995 F.2d 1331, 1343 (6th Cir. 1993).

New Jersey has developed its own immunity scheme through the New Jersey Tort Claims Act. Qualified immunity is provided by N.J.S.A. 59:3-3; prosecutorial immunity is provided by N.J.S.A. 59:3-8. Importantly for purposes of this motion, the New Jersey immunity statutes are not exact replicas of federal immunity law. The prosecutorial immunity statute, for example, while providing that "[a] public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment," N.J.S.A. 59:3-8, limits the immunity with N.J.S.A. 59:3-14, which provides that a public employee is not "exonerate[d] . . . from liability if it is established that his conduct was outside the scope of his employment or constituted a crime, actual fraud, actual malice, or willful misconduct." As explained by the Third Circuit, the "law of New Jersey has for many years refused to extend absolute immunity to state prosecutors." *Mancini v. Lester*, 630 F.2d 990, 995 (3d Cir. 1980). The New Jersey Supreme Court found that "[t]he public interest is best served by recognizing

that prosecutors enjoy only a limited form of immunity." *Cashen v. Spann*, 66 N.J. 541, 551 (1975).

The defendants have not moved to dismiss the state law claims based on state law immunity principles, and have not presented any argument as to whether state immunity applies. The Court cannot dismiss the state claims based on the reasons expressed with regard to the federal claims because the law differs. Therefore, this Court will not dismiss the state law claims on this motion to dismiss, but will allow defendants the opportunity to raise state law immunity issues in a forthcoming filing should they, in good faith, believe that state law provides them with immunity.

4. State of New Jersey

The State of New Jersey seeks summary judgment in its favor as to all claims against it, namely the respondeat superior claims in Counts 35 and 36, asserting that it is immune from suit under the Eleventh Amendment. (Defs.' Br. at 23.) Plaintiffs disagree, arguing that the State cannot waive its Eleventh Amendment immunity here because it waived its Eleventh Amendment immunity in other unrelated cases which involved "identical causes of action" to those asserted here. (Pls.' Br. at 30 n. 21.) Plaintiffs are incorrect; because the State has not waived its immunity in this specific case, this Court will grant the State's motion for summary judgment as to the claims asserted against it.

The Eleventh Amendment grants States immunity from suits in federal court which are brought by its citizens, or by citizens of another State. *Hans v. Louisiana*, 134 U.S. 1 (1890); *see also Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100 (1984). As a result, a plaintiff may only sue a State in federal court if Congress has abrogated the State's immunity through a law which makes such an intention unequivocally clear, *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001), or if the State waives its immunity in the case and consents to the suit, *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997).

Eleventh Amendment immunity protects the State here. This is a case where the State was involuntarily made a defendant in a federal lawsuit by plaintiffs' filing of a Complaint in federal court, and where the State has asserted its Eleventh Amendment immunity with its first filing. Regardless of whether or not it waived immunity over similar claims in unrelated lawsuits is irrelevant; here it has not done so. *See Lapides v. Bd. of Regents of the Univ. Sys. Of Georgia*, 535 U.S. 613, 622 (2002).

Therefore, this Court will grant the State's motion for summary judgment as to the claims asserted against it because it has Eleventh Amendment immunity from such claims.

VI. CONCLUSION

For the foregoing reasons, this Court has decided the three pending motions as follows. Dr. Gross' motion will be granted in part as to familial interference claims and the negligence claims to the extent that they seek relief for Gross' misrepresentation of the cause of Ellen's death, but will be denied in part as to the negligence claims to the extent they seek relief for other acts. The motion of the County of Atlantic, Hydow Park, M.D., and Barbara Fenton will be granted in part as to the family interference claims and denied in part as to the negligence and section 1983 claims. The motion of defendants Bruce DeShields, Eladio Ortiz, Jeffrey Blitz, Murray Talasnik, and the State of New Jersey will be granted in part as to all federal claims, as to all claims against the State of New Jersey, and as to the warrantless search (Count 18), and invasion of privacy (Count 19) claims. It will be denied in part as to all other state claims. The plaintiffs have thirty days to replead their familial interference claims with the specificity explained herein. The accompanying Order will be entered.

February 23, 2004 /s/ **Jerome B. Simandle**
Date JEROME B. SIMANDLE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JAMES ANDROS, III, individually and as Natural Father and Guardian of xxx and xxx, minors, Plaintiffs, v. ELLIOT M. GROSS, M.D., BRUCE K. DESHIELDS, ELADIO ORTIZ, JEFFREY BLITZ, ESQUIRE, MURRAY A. TALASNIK, ESQUIRE, HYDOW PARK, M.D., BARBARA FENTON, COUNTY OF ATLANTIC, STATE OF NEW JERSEY, Defendants.	HON. JEROME B. SIMANDLE Civil No. 03-1775 (JBS)
JAMES ANDROS, III, individually and as Natural Father and Guardian of xxx and xxx, minors, Plaintiffs, v. CHRISTOPHER WELLMAN, Defendant.	Civil No. 04-5968 **OPINION**

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SIMANDLE, District Judge:

On February 23, 2004, this Court issued a 76-page Opinion which considered, in depth, the viability of many of the claims in the thirty-seven count Complaint filed by Plaintiff James Andros, individually and on behalf of his minor children xxx and xxx.[1] By the accompanying Order, the Court, *inter alia*,

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[1] Defendants include Atlantic County Medical Examiners Elliot M. Gross, M.D. and Hydow Park, M.D., nurse Barbara Fenton, two members of the investigative section of the Atlantic County Prosecutor's Office, Sergeant Bruce DeShields and Lieutenant Eladio Ortiz, Atlantic County Prosecutor Jeffrey S. Blitz, Atlantic County First Assistant Prosecutor Murray A. Talasnik, the County of Atlantic, and the State of New Jersey.

granted the motions for summary judgment filed by Blitz, Talasnik, DeShields and Ortiz on the grounds of federal immunity.

Plaintiffs subsequently moved for partial reconsideration of the February 23, 2004 Opinion and Order as to the Court's probable cause determination. Additionally, Prosecutors Blitz and Talasnik, and Investigator DeShields (hereinafter "Defendants"), moved for dismissal and/or summary judgment on all remaining state law claims.[2] By Order date December 20, 2004, the Court permitted additional discovery and supplemental briefing. Meanwhile, on December 3, 2004, Plaintiffs filed a complaint against Defendant Christopher Wellman almost identical to the original complaint. On December 21, 2004, the two actions were consolidated. On April 8, 2005, Wellman filed a motion for summary judgment.

Despite the considerable time available to Plaintiffs to take additional discovery, the factual landscape known to the Court at the time of its February 23, 2004 Opinion has remained largely unchanged. Accordingly, and for the reasons now stated, Plaintiff's motion for partial reconsideration will be denied, and the motions for summary judgment by

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[2] Though Defendants captioned this motion as a motion for dismissal and/or summary judgment, "[b]ecause the grant of summary judgment and the dismissal of the complaint are inconsistent," the Court here will treat the record as a summary judgment record. *Strozyk v. Norfolk Southern Corp.*, 358 F.3d 268, 270-71 (3d Cir. 2004).

Defendants Blitz, Talasnik, DeShields and Wellman will be granted.

I. BACKGROUND

This matter stems from an incorrect March 2001 autopsy report in which Atlantic County Medical Examiner Elliot M. Gross, M.D. concluded that the sudden death of Plaintiff's 31-year old wife, Ellen Andros, was the result of "asphyxia due to suffocation." The autopsy report prompted a homicide investigation which uncovered evidence of great marital discord between Plaintiff and his wife, in which she was in fear for her life. Eventually, Plaintiff was arrested and indicted for one count of first degree murder.

Plaintiff was innocent, as the Prosecutor's Office learned during final preparations for Plaintiff's criminal trial in late 2002. Specifically, the Prosecutor's Office retained another pathologist, Donald Jason, M.D., to testify as an expert witness at trial. After he reviewed the evidence Dr. Jason concluded that Ellen Andros had died from a spontaneously dissecting coronary artery, a natural cause of death.[3] Dr. Gross, and his supervisor, Dr. Park, reviewed Dr. Gross's initial autopsy conclusion and, on December 3, 2002, indicated their agreement with Dr. Jason's conclusion – Ellen Andros had died of natural causes.

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[3] Dr. Jason's findings were contained in his November 30, 2002 report.

The indictment against Plaintiff was dismissed on the following day, December 4, 2002.

On April 22, 2003, Plaintiff filed the underlying action and, in the February 23, 2004 decision, the Court considered the viability of many of those claims in deciding the motions to dismiss filed by Gross, Park, Fenton, and the County of Atlantic, as well as the motion for summary judgment filed by Prosecutors Blitz and Talasnik, Investigators Ortiz and DeShields, and the State of New Jersey. Plaintiffs timely moved for partial reconsideration of that decision, and Defendants moved for summary judgment on all remaining state law claims. On April 8, 2005, Defendant Wellman moved for summary judgment.

The Court will treat with Plaintiffs' partial reconsideration motion first.

II. MOTION FOR PARTIAL RECONSIDERATION

A. Standard of Review

"A party seeking reconsideration must show more than a disagreement with the court's decision, and recapitulation of the cases and arguments considered by the court before rendering its original decision fails to carry the moving party's burden." *Panna v. Firstrust Sav. Bank*, 760 F. Supp. 432, 435 (D.N.J. 1991) (internal citations omitted); Local Civil Rule

7.1(i). Instead, to justify relief on a motion for reconsideration, the moving party must show:

(1) an intervening change in the controlling law;

(2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or

(3) the need to correct a clear error of law or fact or to prevent manifest injustice.

See Max's Seafood Café v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999).

"Motions for reargument succeed only where a dispositive factual matter or controlling decision of law was presented to the Court but not considered." *Damiano v. Sony Music Entertainment*, 975 F. Supp. 623, 634 (D.N.J. 1996) (quoting *Pelham v. United States*, 661 F. Supp 1063, 1065 (D.N.J. 1987)). Where no facts or cases were overlooked, the motion must be denied. *Resorts Int'l v. Greate Bay Hotel & Casino*, 830 F. Supp. 826, 831 (D.N.J. 1992). If the record was inadequately developed on a particular issue, the court has discretion to reconsider the matter, *Hatco Corp. v. W.R. Grace Corp.*, 849 F. Supp. 987, 990 (D.N.J. 1994), but not to the extent of considering new evidence that was available but not submitted while the motion was pending. *Florham Park Chevron, Inc. v. Chevron, USA, Inc.*, 680 F. Supp. 159, 162 (D.N.J. 1988).

B. Analysis

Plaintiffs assert, in the first instance, that this Court overlooked key evidence when it concluded that probable cause existed by April 6, 2001 to suspect Plaintiff of murdering his wife. Accordingly, Plaintiffs' argue, the Court must correct this "clear error" to "prevent manifest injustice." Additionally, Plaintiffs claim that the evidence uncovered through additional discovery demonstrated that there is a dispute of fact whether probable cause existed in April 2001. Plaintiffs, however, overstate what has been uncovered through additional discovery. For the reasons explained in the Court's February 23, 2004 Opinion, as well as in the discussion below, Plaintiffs' claims are, as they were before, without legal merit.

In its February 23, 2004 Opinion, the Court explained that "probable cause to arrest exists when the facts and circumstances are such that 'a reasonable person [would] believe that an offense has been . . . committed by the person to be arrested.' (Slip Op. at 56 (quoting *Orsatti v. New Jersey State Police*, 71 F.3d 480, 483 (3d Cir. 1995)). The Court then detailed the evidence which led it to conclude that, even viewed in the light most favorable to Plaintiffs, there was probable cause to suspect that Plaintiff had committed the crime on April 6, 2001:

> Dr. Gross issued his conclusion that Ellen had died as a result of homicide on March 31, 2001, the date of her death. The prosecutors, though they may have immediately suspected plaintiff, did not have clear evidence

that he committed the murder. They were faced with contradictory evidence, namely his story, which he consistently maintained, that he was at the Beach Bar & Grill throughout the night and did not know his wife was home, and his mother-in-law's initial reaction that he could have killed Ellen. Prosecutors surely had reason to continue their investigation into plaintiff's relationship with his wife, but they did not necessarily have probable cause to believe that he murdered his wife in the days immediately following her death.

By April 6, 2001, though, the landscape had changed and the defendants had probable cause to believe that plaintiff was guilty of the crime. By then, they had discovered that plaintiff's alibi was not tight. Though there was evidence that Ellen died between 2:00 and 2:30 a.m. and plaintiff claimed he was at the Beach Bar & Grill from 9:00 p.m. until 4:00 a.m., no witness could testify that he was there the entire period. Instead, the witnesses provided a wide range of arrival and departure times, with plaintiff arriving somewhere between 11:00 p.m. and 1:00 a.m. and leaving between 3:30 a.m. and 4:00 a.m. (*See* Kent Cert., Exs. 3-5, 26-28.)

Also by April 6, 2001, the prosecutors had Dr. Gross' supplemental report which again concluded that Ellen was a victim of

> homicide.[4] They had also learned by April 6th that plaintiff was estranged from his wife and had threatened to hurt her on several previous occasions. On April 6, 2003, Calvin Gadd verified reports by Sharon Hogan, Julie Goldberg, and Viola McElroy that Ellen wanted to leave plaintiff but was frightened of him because he had threatened to kill her with his gun and with his car, and because he was especially violent when intoxicated. (Clarke Cert., Ex. B.) That Ellen was found dead after her husband returned from a night of drinking, given his past threats toward her and his history of violence when intoxicated, strongly heightened these defendants' suspicions. The supplemental report, coupled with the other witness statements and evidence obtained between March 31 and April 6, 2001, provided probable cause to suspect plaintiff of the murder.

(Slip Op. at 56-58.)

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[4] Plaintiffs assert that this Court must change its probable cause determination because Dr. Gross's supplemental report was not signed until April 9, 2001. (*See* Pl. Br. at 2.) In referring to Dr. Gross' report in the February 23, 2004 Opinion, the Court considered the date of Dr. Gross's second examination of the body on April 1, 2001. (*See* Kent Cert., Oct. 1, 2003, Ex. 22.) Plaintiffs are correct that while Dr. Gross dictated his report about the second examination on April 2, 2001, he did not sign the report until April 9, 2001. (*Id.* at 9.) The Court finds, though, that this difference is not material. At best, it pushes the probable cause determination to April 9, 2001.

The Court then explained that the exculpatory evidence available to the Defendants in April 2001 did not negate the existence of probable cause, stating:

> The Court has considered the evidence which existed on April 6, 2001 which was exculpatory toward plaintiff, but finds that it did not eliminate the probable cause that existed.
>
> First, as noted above, the Beach Bar & Grill alibi was not tight, the alibi witnesses were of questionable reliability such as Mr. Andros' father who was highly intoxicated, and investigators reasonably concluded that even if Ellen was murdered at 2:00 a.m., plaintiff could have been responsible.
>
> Second, while Ellen's body showed no signs of struggle which could indicate that she may have died of natural causes, it could also indicate that she did not struggle because she knew her attacker.
>
> Third, while Dr. Gross' finding of asphyxiation by suffocation was not entirely consistent with his finding of pre-mortem petechiae, it was consistent with a finding of asphyxiation and, according to Dr. Jason, was the "most likely" explanation for her death prior to viewing the slides which confirmed the alternate basis. (*See* Clarke Cert., Ex. H at 7.)
>
> These defendants, being law enforcement personnel and not trained in pathology, could reasonably rely upon the medical conclusions

> of Dr. Gross as of April 6th. The so-called "clearly exculpatory evidence," therefore, was not "clearly exculpatory" at the time, even though it would eventually prove true. The defendants had probable cause on April 6, 2001 to believe plaintiff had murdered his wife.

(Slip. Op. at 58-59.)

With this motion for reconsideration, Plaintiffs argue first that the Court overlooked critical evidence that Plaintiff was at the Beach Bar and Grill at the time of Ellen's death. Moreover, Plaintiffs assert that this Court failed to recognize that Defendants knew Dr. Gross believed Ellen's death was two to five hours after her last meal at 10:00 p.m., that computer evidence supported the conclusion that Ellen died between 1:48 a.m. and 2:20 a.m., that witnesses placed Plaintiff at the Beach Bar and Grill until 4:00 a.m., and that their expert, Anthony Mautone, Esquire, concluded that this evidence required a finding of no probable cause. (Pl. Br. at 5.) There is no support for Plaintiffs' position.

The Court considered, in depth, this exculpatory time of death evidence,[5] but concluded that there still

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[5] The Court specifically noted that:

> [W]itnesses placed plaintiff at the Beach Bar and Grill in Brigantine from about 9:00 p.m. until 4:00 a.m., (Compl. ¶¶ 14, 35), while other evidence indicated that Ellen died between 2:00 and 2:30 a.m., (*id.* ¶¶ 18, 39.) Computer records showed that she sent an e-mail

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was sufficient evidence for a finding of probable cause in April 2001. (*See* Slip. Op. at 59.) Plaintiff's alibi was not tight; Plaintiff had a history of violent discord with his wife; Plaintiff had previously threatened to smother his wife with a pillow; and Plaintiff had historically been more violent when intoxicated.[6]

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at 1:48 a.m. and that her America On-Line account was logged off "due to inactivity" at about 2:30 a.m. (*Id.* ¶¶ 18, 38; Kent Cert., Ex. 8 at 3.) Medical evidence supported the 2:30 a.m. time of death as she likely died two hours prior to the arrival of emergency personnel at 4:31 a.m. when the first responders noted cold extremities and lividity, (Compl. ¶¶ 20, 22, 24, 39; Kent Cert., Ex. 16 at 7, *id.*, Ex. 36 at 5), three to four hours after her last meal, which she finished between 10:00 and 10:30 p.m., (*id.* ¶ 39, Kent Cert., Ex. 7 at 3), and four hours prior to Barbara Fenton's arrival around 7:00 a.m. when she noted the presence of +4 rigor mortis in the neck and jaw, blanching livor on the face, mottling on upper arms, and thick livor on dependent areas of the body, (Compl. ¶ 39; Kent Cert., Ex. 19).

(Slip Op. at 11.)

[6] The Court explained that:

[T]hough several witnesses were able to place plaintiff at the Beach Bar and Grill during the early morning hours of March 31st, no one witness could verify that plaintiff was at the bar the entire 9:00 p.m. until 4:00 a.m. period as he said. The bar's manager, Joseph Takach, told police that he thought plaintiff arrived around 1:00 a.m. and left around 3:45 a.m. (Kent Cert., Exs. 3, 28.) Plaintiff's friend, Christopher Howe, though, said that plaintiff was at the bar when he arrived around 11:00 p.m. and that he thought he stayed until "approximately 4:00 a.m." (Kent Cert., Exs. 5, 26.) The bartender, Tania Grossman also

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All the evidence, including the time of death evidence, still suggested Plaintiff was the perpetrator of the crime. In sum, this time of death evidence that Plaintiffs now point to has been fully discussed and considered, and provides no basis for relief on this motion for reconsideration.

Second, Plaintiffs assert that this Court's probable cause finding is flawed because the Court overlooked Plaintiffs' allegations that the Defendants relied on manipulated evidence about the time of Ellen's death. (Pl. Br. at 6-9.) They assert that the Court failed to recognize that an April 1, 2001 phone log shows that an investigator asked that "Dr. Park and Dr. Gross brainstorm the matter to get a time of death," (Pl. Br. at 5), that Plaintiff only needed an alibi for the period from 1:48 a.m., the time she sent her last e-mail, to 3:00 a.m., five hours after her last meal at 10:00 p .m., (Pl. Br. at 7), and that Defendant DeShields acknowledged at the Grand Jury proceeding that the "balance of the evidence [was] that Jim

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remembered that plaintiff had entered the bar around 11:00 p.m., but she thought he left "just before 3:30 a.m." (Kent Cert., Exs. 9, 27.) Another friend of plaintiff's, Brian Keena, said that he saw plaintiff at the bar and that he left between 2:00 and 3:00 a.m., but that he did not know when plaintiff left. (Kent Cert., Ex. 4.) Plaintiff's father told police that plaintiff had left the bar "little bit before me, I don't know exactly when" because he was so inebriated by that time that he spent the night in his truck in the bar's parking lot. (Kent Cert., Ex. 2 at 2.) Defendants, therefore, did not feel that plaintiff's alibi was tight.

Andros was at the bar that night and most of that night." (Pl. Br. at 8-9.) Plaintiffs assert that this evidence establishes that Defendants knew Plaintiff was not at the house when Ellen died, but manipulated the evidence to create probable cause. Therefore, Plaintiffs assert that this Court made a clear error in concluding that the Defendants had probable cause to suspect Plaintiff.

Contrary to Plaintiffs' position, the Court did consider the foregoing evidence in concluding that Defendants had probable cause to suspect Plaintiff. With respect to the phone log asking Dr. Gross and Dr. Park to "brainstorm" about the time of death, the Court specifically referred to Plaintiffs' allegations that "Dr. Gross then met with defendants Hydow Park, M.D., Jeffrey Blitz, and Murray A. Talasnik, to 'brainstorm' how they could 'manipulate' the evidence to make it appear that plaintiff had murdered his wife." (Slip Op. at 10 (citing Compl. ¶ 42).) Plaintiffs failed to point to anything in the record, though, suggesting that the phone log's request for a time of death was anything other than a legitimate request for an accurate time of death in a homicide investigation.

With respect to Plaintiff's alibi from 1:48 a.m. to 3:00 a.m., the Court specifically considered that "witnesses placed plaintiff at the Beach Bar and Grill in Brigantine from about 9:00 p.m. until 4:00 a.m., while other evidence indicated that Ellen died between 2:00 and 2:30 a.m." (Slip Op. at 11 (citing Compl. ¶¶ 14, 18, 35, 39).) The Court also explained

the wide disparity in the testimony of the witnesses who placed Plaintiff at the bar. Since the Beach Bar and Grill was only 20 minutes from the Andros home, an absence of as little as 45 minutes around 2:00 a.m. would have sufficed for a round trip to commit this crime. While they all seemed to agree that Plaintiff was there between 1:00 a.m. and 3:00 a.m., their wide differences in his arrival and departure times, which indicated his arrival between 9:00 p.m. and 1:00 a.m. and his departure between 2:00 a.m. and 4:00 a.m., as well as their varying states of intoxication and opportunities to observe and recollect his comings and goings, simply did not make Plaintiff's alibi strong enough to withstand scrutiny in the face of the inculpatory evidence then known to the officials. In the end, Plaintiff's alibi was valid and he was at the Beach Bar and Grill as he said he was. However, the Court, based on the evidence available to prosecutors and investigators in April 2001, explained that they could have reasonably concluded that he probably committed the crime.

In sum, Plaintiffs failed to come forward with evidence at the summary judgment phase which could cause a reasonable factfinder to conclude that no probable cause existed in April 2001. The Defendants were faced with the untimely death of a healthy thirty-one year old female which had been ruled a homicide, with evidence that she had been physically threatened by her husband, and with evidence that the husband had been twenty minutes away at a bar the night of her death while she was

home alone. Taken together, it could have been reasonably concluded that the evidence implicated Plaintiff in spite of his alibi, given evidence of his expressed intent to kill her, his motive, and his opportunity.

Similarly, despite the considerable time afforded in which to take additional discovery, Plaintiffs have failed to come forward with evidence at this reconsideration phase which could cause a reasonable factfinder to question the existence of probable cause in April 2001. In their supplemental submissions, Plaintiffs argue that additional discovery has yielded evidence that (1) in the days following the victim's death Defendants "believed that Mr. Andros had a corroborated and uncontradicted alibi until between 4:00 a.m. and 4:30 a.m. on March 31, 2001," and (2) Dr. Gross informed the Defendants that the victim died between 12:00 a.m. and 3:00 a.m. and, thus, that Defendants "were aware that Ellen died well before 4:00 a.m. on March 31."[7] (Pl. Supp. Br. at 1-2.) This additional evidence, however, even if accepted as true for purposes of this motion, does not change the factual landscape shaping the Court's earlier discussion – (1) that the officers were aware of Mr. Andros's

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[7] Plaintiffs rely on the following information gathered through additional discovery in support of these claims: (1) the disputed testimony of Dr. Gross that as of April 10, 2001 he had relayed his time of death opinion to Defendants Yeats, Wellman, DeShields, Blitz and Talasnik, and (2) his statement to DeShields and Talasnik that it was "highly unlikely" that Ellen's time of death was close to 4:00 a.m. (Pls. Supp. Br. at 4.)

alibi, and (2) that Dr. Gross's autopsy report suggested a time of death inconsistent with that alibi.[8]

First, as already detailed, in light of the wide discrepancies in the testimony of the witnesses detailing Andros's arrival and departure times from the bar, as well as the witness's varying states of intoxication, Andros's alibi was not strong enough to withstand scrutiny. Likewise, even considering the time of death evidence, other factors known to the officers, *see supra*, could have reasonably implicated Andros in spite of his alibi. In any event, as the United States Supreme Court has recently clarified, it is well-settled that "an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause." *Devenpeck v. Alford*, 543 U.S. 146, 125 S. Ct. 588, 593 (2004) (citing *Whren v. United States*, 517 U.S. 806, 812-813 (1996); *Arkansas v. Sullivan*, 532 U.S. 769 (2001) (*per curiam*)). Therefore, even if, as Plaintiffs now argue, the additional discovery has yielded evidence that the Defendants believed (or should have believed) that Andros was not present when his wife died, those subjective beliefs are not enough to overcome the objective facts creating probable cause to arrest Plaintiff in April 2001.

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[8] To the extent there is a dispute of fact as to whether Dr. Gross informed each Defendant of his time of death estimate, for the reasons already explained at length, that dispute does not change the Court's probable cause determination.

Finally, the Court disagrees with Plaintiffs' argument that the inconsistency between Dr. Gross's time of death opinion and Andros's alibi necessitates a finding that the officers "knew" that Andros did not kill his wife. In the first instance, unless the officers knew either the alibi or the time of death estimate to be false, that evidence could have compelled nothing more than a belief that Andros was innocent. And, as the Court pointed out above, "an arresting officer's state of mind . . . is irrelevant to the existence of probable cause." *Devenpeck*, 543 U.S. 146, 125 S. Ct. at 593. In any event, as the Court already explained: "The Court has considered the evidence which existed on April 6, 2001 which was exculpatory toward plaintiff, but finds that it did not eliminate the probable cause that existed." (Slip Op. at 58-59.) Nothing that Plaintiff has offered the Court together with the instant motion alters that determination.[9]

For the above reasons, this Court will deny Plaintiffs' motion for reconsideration of the probable cause determination. The matters asserted by Plaintiffs

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[9] That Defendants may have suppressed certain evidence in making their warrant application, as Plaintiffs contend (Pl. Supp. Br. at 9,) does not alter this Court's conclusion that there was probable cause to arrest Plaintiff on April 6, 2001. Rather, such misconduct is relevant, if it all, to Plaintiffs' malicious prosecution claim, discussed below.

have been thoroughly considered and reconsidered by the Court and provide no basis for relief.[10]

III. MOTION FOR SUMMARY JUDGMENT ON STATE LAW CLAIMS

A. Rule 56(c) Motion for Summary Judgment

Summary judgment is appropriate when the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *See Anderson v. Liberty Lobby, Inc.*,

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[10] Plaintiffs additionally assert that this Court's ruling regarding absolute immunity is flawed even if the probable cause determination is not changed because absolute immunity applies only to prosecutorial actions taken after the prosecutors had probable cause. Thus, Plaintiffs argue that this Court should allow their federal claims to continue against these Defendants for actions taken prior to April 6, 2001. Plaintiffs have failed to recognize, though, that this Court found that Defendants are entitled to qualified immunity for the federal claims for their actions which did not fall within the protection of absolute prosecutorial immunity. *See* Slip Op. at 64 stating:

> In the end . . . all federal claims which have been asserted against Blitz and Talasnik, DeShields and Ortiz, will be dismissed, as the claims which remain after the Court's prosecutorial immunity decision fall within the doctrine of qualified immunity, as explained *infra*.

(Emphasis in original omitted).

477 U.S. 242, 248 (1986). A fact is "material" only if it might affect the outcome of the suit under the applicable rule of law. *Id.* In deciding whether there is a disputed issue of material fact, the court must view the evidence in favor of the non-moving party by extending any reasonable favorable inference to that party. *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999).

The moving party always bears the initial burden of showing no genuine issue of material fact exists, regardless of which party ultimately would have the burden of persuasion at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). However, where the nonmoving party bears the burden of persuasion at trial, "the burden on the moving party may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. The non-moving party "may not rest upon the mere allegations or denials of" its pleading to show a genuine issue exists and must do more than rely only "upon bare assertions, conclusory allegations or suspicions." Fed. R. Civ. P. 56(e); *Gans v. Mundy*, 762 F.2d 338, 341 (3d Cir. 1985).

B. Motion for Summary Judgment by Blitz, Talasnik and DeShields

Defendants Blitz, Talasnik, and DeShields seek summary judgment on all state claims asserted

against them.[11] (Pl. Br. at 6-7; Guernsey Aff. ¶¶ 13-17.) For the following reasons, the motion will be granted.

1. New Jersey Statutory Immunity

Defendants Blitz, Talasnik and DeShields claim they are entitled to official immunity under the New Jersey Tort Claims Act, N.J.S.A. 59:3-1 *et seq.*[12] Specifically, Defendants claim that they are entitled to protection from all state law claims under N.J.S.A.

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[11] The remaining state law claims as to Defendants Blitz, Talasnik and DeShields are:

Count 6 (malicious prosecution, state constitution)
Count 8 (malicious prosecution, common law)
Count 9 (defamation, state constitution)
Count 10 (conspiracy, common law)
Count 11 (aiding and abetting, common law)
Count 16 (false arrest, false imprisonment, common law)
Count 20 (invasion of privacy, false light)
Count 24 (negligence)
Count 26 (abuse of process, state constitution)
Count 27 (abuse of process, common law)
Count 32 (intentional infliction of emotional distress)
Count 37 (punitive damages).

The Court previously granted summary judgment on the two state law claims which implicated Defendant Ortiz, namely Counts 18 (warrantless search) and 19 (invasion of privacy). (*See* Slip Op. at 71-72.)

[12] The scope of this immunity is limited by N.J.S.A. 59:3-14, which eliminates immunity protection for an official "if it is established that his conduct was outside the scope of his employment or constituted a crime, actual fraud, actual malice or willful misconduct."

59:3-8[13] and, as to the false statement claims, N.J.S.A. 59:3-10.[14] Finally, Defendants invoke the protection of N.J.S.A. 59:3-3 as to all state law claims with the exception of those for false statements.[15] Defendants argue that the Court's finding as to federal immunity dictates an identical holding for the state claims. Even though the Court's decision to grant summary judgment as to the remaining claims does not rest on immunity grounds, the Court will take this opportunity to clarify the relationship between state and federal immunities.

In *Hayes v. Mercer County*, the New Jersey Appellate Division "adopt[ed] the objective good-faith standard announced in *Harlow* [*v. Fitzgerald*, 457 U.S. 800 (1982)] as the standard to be applied in defining the good-faith component of qualified immunity under [59:3-3 of] the Tort Claims Act." *Hayes*, 217 N.J. Super. 614, 622 (App. Div. 1987). That standard is as follows:

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[13] N.J.S.A. 59:3-8 states that "[a] public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment."

[14] Under N.J.S.A. 59:3-10, "[a] public employee acting in the scope of his employment is not liable for an injury caused by his misrepresentations."

[15] N.J.S.A. 59:3-3 states that "[a] public employee is not liable if he acts in good faith in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment."

> Qualified or good faith immunity is an affirmative defense that must be pleaded by a defendant official. . . . [T]he good faith defense has both an objective and a subjective aspect. The objective element involves a presumptive knowledge and respect for basic, unquestioned constitutional rights. The subjective component refers to permissible intentions. . . . [Q]ualified immunity would be defeated if an official knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], ***or*** if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury.

Harlow, 457 U.S. at 815 (additional emphasis in original omitted). In other words, to lose the protection of qualified immunity under this standard, a Plaintiff must demonstrate *either* that the official violated a clearly established constitutional right *or* that the official had a malicious intention to cause an injury.

Defendants here argue that the Court's February 23, 2004 Opinion, holding that Defendants are entitled to qualified immunity on Plaintiffs' federal claims, necessitates a finding that the "good faith" standard under the Act is also satisfied. That presumption is not necessarily correct. Indeed, the Court explained in its February 23 Opinion that "federal

immunity does not extend to the state law claims asserted here."[16] (Slip Op. at 73.) Unlike federal immunity, statutory immunity under the New Jersey Tort Claims Act provides officials with protection from liability, not from suit. As the Third Circuit has explained,

> [t]he Tort Claims Act's dominant consideration of immunity and policy of deterrence are . . . consistent . . . with the view that the Act was intended to shield public officials and entities only from ultimate liability – and *not* initially from suit. . . . Indeed, all of the many sections of the Act that provide for or negate the immunity of public entities and employees speak solely in terms of immunity from liability and not of immunity from suit. . . . New Jersey cases construing the Tort Claims Act also are consistent with the view that the Act was not intended to confer immunity from litigation upon the state's public officials.

Brown v. Grabowski, 922 F.2d 1097, 1108 (3d Cir. 1990) (citations omitted). In sum, the Court's determination as to state law immunity need not mirror the Court's prior federal immunity decisions.

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[16] Nonetheless, Defendants continue to argue in their supplemental submissions and in Wellman's motion for summary judgment that federal and state immunity are coextensive.

2. State Law Claims

In the first instance, in light of the Court's determination that probable cause existed to arrest and prosecute Andros on April 6, 2001, the Court will grant summary judgment on Plaintiffs' claims for malicious prosecution (Count 6),[17] false arrest (Count 8), false imprisonment (Count 16), negligence (Count

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[17] To be sure, the Court is aware that where an indictment is procured by fraud, perjury, or other corrupt means, such as Plaintiffs have alleged here, (*see* Pls. Supp. Br. at 9,) the indictment alone will not suffice as prima facie evidence of probable cause for purposes of a malicious prosecution claim. *Rose v. Bartle*, 871 F.2d 331, 352 (3d Cir. 1989). However, that a grand jury indictment is procured through such improper means will not, without more, defeat probable cause to arrest or prosecute. *Id.* at 353. Indeed, for the reasons explained at length above, probable cause here existed without regard to the truthfulness of the alleged misstatements. *See Sherwood v. Mulvihill*, 113 F.3d 396, 399 (3d Cir. 1997) (false statements are actionable only if material to a finding of probable cause); *Roberts v. Toal*, 1997 U.S. Dist. LEXIS 1836, at *25 (E.D.Pa. Feb. 20, 1997) (holding for a section 1983 malicious prosecution claim that "a plaintiff's Fourth and Fourteenth Amendment rights are violated if information is knowingly or recklessly omitted from an affidavit [of probable cause] *and the information, if included, would have vitiated probable cause*" (emphasis added)). In any event, Plaintiffs' arguments that the prosecutor deceived the grand jury were already advanced and rejected by the Honorable Manual H. Greenberg, a conclusion with which this Court agrees. (Clarke Cert., Ex. F(2).) Accordingly, Plaintiffs' malicious prosecution claim fails as a matter of law. *Herman*, 2003 U.S. App. LEXIS 8549, at *5 n.3 (holding the existence of probable cause operates as an absolute bar to claims for malicious prosecution).

24),[18] and intentional infliction of emotional distress (Count 32). *See Herman v. City of Millville*, 2003 U.S. App. LEXIS 8549, at *5 n.3 (3d Cir. May 5, 2003) (holding probable cause is an absolute defense under New Jersey law to claims of false arrest, false imprisonment, malicious prosecution, negligence and intentional infliction of emotional distress); *Wildoner v. Borough of Ramsey*, 744 A.2d 1146, 1154 (N.J. 2000) ("[P]robable cause is an absolute defense [under New Jersey law] to Plaintiff's false arrest, false imprisonment and malicious prosecution claims.").

(a) Defamation (Count 9)

In Count 9 of the Complaint, Plaintiffs allege that Defendants made false statements through various news mediums that Plaintiff mentally and physically abused his wife, and that he was responsible for her murder. Because no such false statements were made, Plaintiffs' state law defamation claim must fail.

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[18] A showing of wilful misconduct that would defeat immunity under the New Jersey Tort Claims Act necessarily requires more than mere negligence. *Marley v. Palmyra*, 193 N.J. Super. 271, 292 (Law Div. 1983). Indeed, "good faith" under the Act "may exist in the presence of negligence." *Id.* In any event, assuming Defendants owed a duty to Plaintiff, there was no breach of that duty if Defendants had probable cause to arrest and charge Andros. *See Herman*, 2003 U.S. App. LEXIS 8549, at *5 n.3.

"A defamatory statement is one that is false and injurious to the reputation of another or exposes another person to hatred, contempt or ridicule or subjects another person to a loss of the good will and confidence in which he is held by others." *Romaine v. Kallinger*, 109 N.J. 282, 287 (1988). Here, the public statements made by Defendants in several press releases were not false. (Clarke Supp. Cert. Ex. A.) Instead, they merely recounted the allegations mounted against Plaintiff. Indeed, both press releases issued subsequent to Plaintiff's arrest but prior to the dismissal of the indictment specifically noted: "These charges are merely an accusation and not proof of guilt. In all criminal cases, a charged defendant is presumed innocent until proven guilty." *Id.*

To be sure, in the June 5, 2001 press release issued by the Atlantic County Prosecutor's Office, it was reported that Defendant Blitz stated that "[a]n autopsy indicated that Mrs. Andros died from asphyxia due to suffocation." (Clarke Supp. Cert. Ex. A.) In fact, as it was later determined, the death was not caused in this manner. However, both the initial autopsy conducted by Defendant Gross on Saturday, March 31, 2001, from roughly 11:00 a.m. until 2:30 p.m., and a reexamination on April 1, 2001, demonstrated to Dr. Gross that the death was caused by "asphyxia due to suffocation." (Compl. ¶ 25.) Accordingly, Defendant Blitz's statement that the "autopsy indicated" death from asphyxia due to suffocation was not false. Accordingly, Plaintiffs' defamation claim

fails as a matter of law. Summary judgment as to Count 9 will be granted.[19]

(b) Invasion of Privacy – False Light (Count 20)

"[I]nvasion of privacy is not one tort, but a complex of four. The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the

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[19] Additionally, New Jersey courts "have long recognized the existence of a qualified privilege that confers immunity upon a public official for defamation uttered in relation to matters committed by law to his control or supervision." *Brayshaw v. Gelber*, 232 N.J. Super. 99, 112 (App. Div. 1989); N.J.S.A. 59:3-10 ("A public employee acting in the scope of his employment is not liable for an injury caused by his misrepresentation."). Indeed,

> [a]lthough the communication of information to the news media may not be specifically [d]esignated as a duty of public officials, it is increasingly recognized that if this communication pertains to matters which are within the scope of an official's responsibilities, such statements should be regarded as being within the outer perimeter of the officials line of duty.

Brayshaw, 232 N.J. Super. at 111-12. To be sure, immunity may be lost if "the defamation is made with actual malice in the *New York Times v. Sullivan* sense: 'with knowledge that it was false or with reckless disregard of whether it was false or not.'" *Burke v. Deiner*, 97 N.J. 465, 475 (1984) (internal citations omitted). Here, however, the Court has held that none of the statements made were false.

right of the plaintiff 'to be let alone.'" *Runmbauskas v. Cantor*, 138 N.J. 173, 179-80 (1994) (quoting *Canessa v. J.I. Kislak, Inc.*, 97 N.J. Super. 327, 334 (Law Div. 1967)). One of those four, placing plaintiff in a false light in the public eye, is the subject of Count 20 here.

It is well settled in New Jersey that a claim for "invasion[ ] of privacy involving publicity that unreasonably places the other in a false light before the public" is actionable. *Romaine*, 109 N.J. at 293. One of the elements of such a claim is, obviously, falsity.[20]

The same allegedly false statements identified in Count 9 of the Complaint form the basis of Plaintiffs' claim for invasion of privacy in Count 20. As the discussion, *infra*, details, though, Plaintiffs have failed to identify any publicly false statements. Accordingly, Defendants' motion for summary judgment as to Count 20 will be granted.

(c) Abuse of Process (Counts 26 and 27)

The Court's determination above as to Plaintiffs' malicious prosecution claim does not end the inquiry as to the abuse of process claim.

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[20] The tort of false light is satisfied upon a showing that (1) the false light in which the plaintiff was placed would be highly offensive to a reasonable person; and (2) the actor had actual knowledge of, or acted with reckless disregard as to the falsity of, the publicized matter and the false light in which the other would be placed. *Romaine*, 109 N.J. at 294.

> An action for malicious abuse of process is distinguished from an action for malicious use of process in that the action for abuse of process lies for the improper, unwarranted and perverted use of process after it has been issued while that for the malicious use of it lies for causing process to issue maliciously and without reasonable or probable cause. Thus it is said, in substance, that the distinction between malicious use and malicious abuse of process is that the malicious use is the employment of process for its ostensible purpose, although without reasonable or probable cause, whereas the malicious abuse is the employment of process in a manner not contemplated by law.

Baglini v. Lauletta, 338 N.J. Super. 282, 293 (App. Div. 2001) (quoting *Ash v. Cohn*, 119 N.J.L. 54, 48 (E. & A. 1937)). "Consequently, basic to the tort of malicious abuse of process is the requirement that the defendant perform 'further acts' after the issuance of process 'which represent the perversion or abuse of the legitimate purposes of that process.'" *Id.* (citations omitted). In other words,

> [t]he gist of this tort [of abuse of process] is the misuse of process justified in itself for a purpose other than that which it was designed to accomplish, and the essential elements are an ulterior motive and some further act after the issuance of process representing the perversion of the legitimate use of the process. Bad motives or malicious intent leading to the institution of a civil

> action are insufficient to support a cause of action for malicious abuse of process. A showing of some coercive or illegitimate use of the judicial process is necessary to a claim that there has been an abuse of the process.

Simone v. Golden Nugget Hotel and Casino, 844 F.2d 1031, 1036-37 (3d Cir. 1988) (citing *Penwag Property Co. v. Landau*, 148 N.J. Super. 493 (App. Div. 1977)) (additional citations omitted).

The institution of criminal proceedings in this case, which necessarily did not occur until the case was presented to the grand jury on June 5, 2001, form the basis of Plaintiffs' abuse of process claims. (*See* Slip Op. at 66 n.21.) First, Plaintiffs' allegations that Defendants lied before the grand jury, even if true, can not form the basis of an abuse of process claim. Indeed, claims of perjury before a grand jury "deal[ ] with the initiation of the process, and not its perversion." *Williams v. Fedor*, 69 F. Supp. 2d 649, 673 (M.D.Pa. 1999); *Mosley v. Delaware Riv. Port Auth.*, 2000 U.S. Dist. LEXIS 22402, at *33 (D.N.J. August 7, 2000) ("For the purposes of an abuse of process claim, 'process' does not include false testimony.")

In any event, Plaintiffs have not pointed to any evidence suggesting that Defendants became aware of the actual cause of death at some point after the issuance of process yet failed to disclose it. To the contrary, the record reflects that as soon as the actual cause of death was confirmed, the indictment was dismissed. As the Court recounted in its February 23,

2004 Opinion, Dr. Jason's November 30, 2002 report was the first indication that Ellen Andros had died of natural causes. On December 2, 2002, Dr. Park indicated that he agreed with that conclusion. And, on December 3, 2002, Dr. Gross wrote that he also concurred. *The very next day*, the motion to dismiss the indictment was granted. Far from perverting the process, Defendants ensured that justice was done. The facts before the Court can not as a matter of law support a claim for abuse of process, and summary judgment for Defendants will be entered on Counts 26 and 27.

C. Motion for Summary Judgment by Wellman

On December 3, 2004, Plaintiff filed suit against Christopher Wellman, a captain in the Major Crimes Unit of the Atlantic County Prosecutor's Office, based on identical facts alleged in Plaintiffs' original complaint. The actions were consolidated on December 21, 2004, and Wellman filed a motion for summary judgment on April 8, 2005 seeking dismissal. For the following reasons, the motion will be granted.

First, the Court will dismiss, because of federal immunity, all federal claims against Wellman. The Court's earlier discussion in connection with its federal immunity determination for Defendants Blitz, Talasnik and DeShields applies with equal force here and will not be repeated.

Additionally, there is no evidence in the record suggesting that Wellman was involved with the Andros investigation beyond its initial stages. The following fairly summarizes that limited involvement:

- Andros placed the 911 call at 4:27 a.m. on March 31, 2001. Between 6:30 a.m. and 7:00 a.m., Wellman received a call from DeShields who was already at the Andros home. Wellman arrived at the home shortly thereafter, at which time he was debriefed by DeShields. Wellman proceeded to walk through the house, place a call to Assistant Prosecutor Dean Wyks to report on the situation, and then leave the premises. (Clarke Cert. Ex. G, Wellman Dep. Tr. at 24-25.)

- Later that same day, Wellman received a call at his home from Investigator Yeats, who had attended the autopsy, and advised Wellman that Dr. Gross had ruled the death a homicide. Specifically, Yeats informed Wellman that Gross had determined the cause of death to be asphyxiation by suffocation. Wellman then spoke in person with Dr. Gross to confirm Yeats's report. Gross repeated his conclusion to Wellman that Ellen died two to five hours after her last meal. (*Id.* at 25-26.)

- On April 3, 2001, a double homicide occurred and Wellman's involvement in the Andros investigation effectively ceased. (*Id.* at 40:10-21; Kent Cert. Ex. E, Wellman Dep. Tr. at 63.) Although Wellman executed the arrest of Andros on April 23, 2001, (Kent Cert. Ex. E, Wellman Dep. Tr. at 61,) he had no involvement in the determination to arrest Andros. (Clarke Cert. Ex. G, Wellman Dep. Tr. at 30.)

As the foregoing makes clear, Wellman's participation in the investigation was extremely limited. In any event, even accepting Plaintiffs' arguments that Wellman "shared the same knowledge" as Blitz, Talasnik and DeShields in connection with his role in the investigation, the Court has already held that information to be insufficient to support any of Plaintiffs' state law claims. Accordingly, for the same reasons expressed above and in the Court's February 23, 2004 Opinion, the state law claims will be dismissed as well.

For these reasons, all claims against Defendant Wellman will be dismissed.

IV. CONCLUSION

For the reasons explained above, the Court has concluded that Plaintiffs' motion for partial reconsideration will be denied. In addition, the Court will dismiss the remaining state law claims against Defendants Blitz, DeShields and Talasnik. Finally, all

claims against Defendant Wellman will be dismissed. The accompanying Order is entered.

December 21, 2005
Date

/s/ **Jerome B. Simandle**
JEROME B. SIMANDLE
U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-2259

JAMES L. ANDROS, III, individually
and as Father and Natural Guardian on
behalf of xxx and xxx, minors,

Appellant

v.

M.D. ELLIOT M. GROSS; BRUCE K. DESHIELDS,
SGT.; ELADIO ORTIZ, LT.; JEFFREY S. BLITZ,
ESQUIRE; MURRAY TALASNIK, ESQUIRE;
M.D. HYDOW PARK; BARBARA FENTON;
COUNTY OF ATLANTIC; STATE OF NEW JERSEY;
JOHN DOE, INVESTIGATORS 1-50, individually,
jointly, severally and in the alternative;
CHRISTOPHER WELLMAN, CPT.

SUR PETITION FOR REHEARING EN BANC

Present: SCIRICA, Chief Judge, SLOVITER,
McKEE, RENDELL, BARRY, AMBRO, FUENTES,
SMITH, FISHER, CHAGARES, JORDAN,
HARDIMAN and *ALDISERT, *Circuit Judges*

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* Judge Aldisert's vote is limited to panel rehearing only.

The Petition for Rehearing filed by the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the Petition for Rehearing by the panel and the Court en banc, is hereby DENIED.

BY THE COURT,

/s/ Julio M. Fuentes
Circuit Judge

DATED: October 20, 2008

tmk/cc: Kevin D. Kent, Esq.
Jennifer K. Welsh, Esq.
Thomas A. Abbate, Esq.
Benjamin Clarke, Esq.